Fishing for Answers in Canada's Inside Passage: Exploring the Use of the Transit Fee as a Countermeasure

Colin B. Picker

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Fishing for Answers in Canada’s Inside Passage: Exploring the Use of the Transit Fee as a Countermeasure

Colin B. Pickert

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The author drew upon his experiences as a commercial fisher in Alaska — albeit as a black cod/halibut longliner, not as a salmon fisherman — in writing this Article.
I. INTRODUCTION

In 1994, following the breakdown of negotiations to revise the Canada–United States Pacific Salmon Treaty (Pacific Salmon Treaty),¹

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Canada imposed a fee of $1500 Canadian on all U.S. commercial fishing boats transiting Canada’s Inside Passage between Washington and southeast Alaska. The attempted revisions to the Treaty concerned an effort by the parties to create a meaningful conservation regime that would allot to all parties an equitable catch of Pacific salmon, while allowing many endangered salmon stocks the chance to recover from overfishing. The Inside Passage transit fee lasted eighteen days during which roughly three hundred U.S. boats were made to pay the fee.

The transit fee violated many provisions of the United Nations Convention on the Law of the Sea (UNCLOS). In particular, the fee violated the right of innocent passage afforded to vessels travelling through waterways like the Canadian Inside Passage. In addition, the fee violated transit guarantees under the General Agreement on Tariffs and Trade (GATT). However, international law is not composed only of treaty law but also includes uncodified international norms and customs — customary international law. This customary international law is often forged in the crucible of international disputes. How states behave and what behavior is considered acceptable by other members of the international community create much of the corpus of customary international law. This Article’s examination of the international dispute over the Inside Passage fee will cast light on the emerging customary international law doctrine of lawful, nonforcible countermeasures. Countermeasures may serve to legitimate a state’s otherwise illegal breach of international law. However, unlike common law justification, international law justification has not been codified in any international treaty or convention. Rather, it is an emerging and debated norm of customary international law. Hence, examinations of international disputes in which countermeasures are used can illuminate the doctrine of countermeasures. Every resort to a countermeasure within a dispute helps to define the boundaries of that doctrine.

This Article will argue that the Canadian Inside Passage transit fee can be characterized as a countermeasure. When so characterized, the transit fee should not be considered illegal under international law, even though the imposition of such a fee violated many of Canada’s treaty obligations. In
addition, because the Inside Passage fee is a concrete example of a countermeasure, an examination of the fee can help illuminate this emerging doctrine of customary international law.

The Pacific salmon dispute involves competing claims and conservation plans for the salmon in the region. This Article will primarily explore the actions of the parties involved in one of the more serious manifestations of this ongoing dispute, the Canadian Inside Passage transit fee. The Article will not examine the complex questions surrounding the merits of the parties' underlying claims, namely, who is entitled to the disputed salmon; rather, the Article will focus on the recent countermeasures employed by the two parties. In addition, this Article will focus on the parties' individual actions and not on the many complex negotiations involved in this dispute. Part II of this Article will describe the history of the dispute, recent developments, and the parties' individual perspectives. Part III will examine the legality of the fee under international treaty law and under the emerging doctrine of countermeasures.

II. THE INCIDENT

A. The Pacific Salmon Industry

Historically, one of the purposes of the state is to assert control over land and resources. Today, the modern state also seeks to control large sections of the sea along its coast. However, when compared to its ability to control terra firma, the state's ability to control the sea is tenuous. While admitting that ultimate control of the oceans is impossible, states nonetheless seek to control their ocean resources, particularly their fisheries. Like the ocean itself, however, fisheries have proven difficult to control because the state cannot stop this wild resource from crossing international borders.

The inability of states strictly to control the ocean, the fishing industry, and the fish themselves often leads to conflict between states. This conflict is exacerbated by technology that allows countries increasingly to exploit more of the ocean and catch more of the fish. As a result, the world's fishing stocks have been declining at an alarming rate, forcing countries to compete for an ever dwindling stock of fish. Disputes over ocean resources do not just confine themselves to an exchange of diplomatic notes, but have on occasion led to aggressive naval actions, such as in the "Cod Wars" between Iceland and Britain. The Pacific salmon dispute is another dispute that has escalated beyond diplomatic notes.

This dispute has not drawn much of the world's attention; attention has instead focused on Canada's more colorful actions in the Atlantic directed against the European Union. Although short lived, Canada's dispute with the European Union included incidents of Canadian patrol vessels firing across

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boat bows, seizing ships, and cutting fishing nets of Spanish boats. Although the dispute in the Pacific did not lead to such dramatic incidents, the Pacific salmon industry also deserves attention, having earned $142 million for British Columbia and $390 million for Alaska in 1993, the year preceding the recent dispute. Hence, this protracted conflict is not only harmful to U.S.-Canadian relations, but could also have a significant effect on both regions' long term economies. If the dispute is not resolved soon, the Pacific salmon industry could share the tragic fate of the Atlantic coast fisheries.

The underlying cause of the dispute can be explained by examining the migratory habits of the Pacific salmon. The Pacific salmon involved in this dispute are born in rivers in Washington, Oregon, Idaho, British Columbia, the Yukon Territory, and southeast Alaska. The salmon, an anadromous species, then migrate downriver to the ocean where they mature, before returning to their birth rivers to spawn and die. The fishers usually catch the salmon when the salmon return to their spawning grounds between June and September, the salmon fishing season.

North American Pacific salmon return to their rivers from the ocean by following a circuitous route. After striking the coast, the salmon swim along the coast until they reach their birth river. Most often this route results in the salmon striking the coast to the north of their birth river, often in Alaskan waters. Salmon born in an Oregon river could return to that river from the high seas by swimming down the coast of southeast Alaska, British Columbia, and Washington before reaching their birth river in Oregon. The Alaskan fishers thus get the first chance to catch those salmon. This migratory pattern makes it impossible for fishers to know the "nationality" of the salmon.

8. Tobin Should Stand Firm on Conservation of B.C. Salmon, FIN. POST, July 5, 1995, at 8 [hereinafter Tobin Should Stand Firm]. Canada's actions in the Atlantic, which imply that coastal states should have control beyond the 200 mile exclusive economic zone to ensure the conservation of fisheries within that zone, deserve further study. However, such a discussion exceeds the scope of this Article.


10. Anadromous species of fish are born in freshwater rivers but migrate to the sea, only to return to their birth river to spawn.

11. There are many different species of Pacific salmon with many different names for the same species (e.g., chinook is also known as king salmon because of its large size). While occasionally the Pacific salmon dispute between the United States and Canada centers on one specific species, I will not differentiate among them in this Article because the basic issues — namely, equitable allocation and conservation — are the same regardless of the species in dispute.

12. Truehart, supra note 9, at A29. However, the fishers catch the salmon after the salmon have been affected by the freshwater of their spawning rivers. The fresh water physically changes the salmon while the rough passage upriver through rapids damages their bodies.

13. In recent years, salmon that ordinarily would not have returned to British Columbia via Alaska have been forced further North into Alaskan waters by the warm waters of "El Niño." Bill Richards, As Salmon Catch Falls, U.S. and Canada Slide into a Heated Dispute, WALL ST. J., June 27, 1994, at A1. This description obviously does not apply to the large numbers of salmon caught in Alaska's other major salmon producing regions, such as Bristol Bay, Kodiak, Kenai Peninsula, and along the Alaska Peninsula.

14. Salmon migration patterns are considerably more complicated than the description above would suggest. For example, it is primarily Northern British Columbia rivers, mainly the Stikine and Taku Rivers, that suffer most from Alaskan salmon fisheries. Parzival Copes, Canadian Fisheries Management Policy: International Dimensions, in CANADIAN OCEANS POLICY: NATIONAL STRATEGIES AND THE NEW LAW OF THE SEA, supra note 1, at 3, 12.
they catch. U.S. fishers in Alaskan waters can therefore catch "Canadian" salmon before Canadian spawned salmon can return to Canadian rivers, while Canadian fishers can catch "Washington" salmon before Washington spawned salmon can return to their spawning rivers. Alaska is in a unique position in that the amount of its annual salmon catch can significantly affect the salmon returning to all the other parties' rivers, while those other parties cannot similarly affect Alaska's salmon catch. It is crucial that all of the coastal parties, particularly Alaska, fully cooperate with any conservation and catch allocation plan for the region.

B. The Pacific Salmon Dispute

The migratory nature of Pacific salmon has historically involved the United States in many international disputes. On occasion, those disputes have even involved countries from the other side of the Pacific Ocean. Closer to home, Pacific salmon have been the subject of U.S.-Canadian disputes since the beginning of this century. The current salmon dispute between the United States and Canada dates from the 1950s when Canada realized that Alaskan fishers were harvesting salmon that were heading for Canadian rivers. Fourteen years of bilateral negotiations resulted in the 1985 Pacific Salmon Treaty, which attempted to balance the fishing agendas of four U.S. states, one Canadian province, one Canadian territory, and twenty-four.

15. Of course, fishers will know the nationality of salmon caught with tags that indicate their place of origin. It is these tags that help marine biologists establish the migratory patterns of the fish and that also provide data to calculate the amount of "Canadian" salmon caught by U.S. fisherman.


17. Eighty-five percent of all salmon harvested from the Pacific coast are caught in Alaskan waters. However, if the other parties' rivers fail to produce young salmon, then eventually Alaska will suffer. In that way, the other parties can have some impact on Alaska's southeast salmon harvests. Rob Tucker, Rift Hurts Treaty Chances: Salmon Prospects Dim, Canadian Says, ANCHORAGE DAILY NEWS, Nov. 5, 1994, at D2.

18. The most notable instance is the salmon fishing dispute between the United States and Japan in the 1930s that resulted in the Truman Fisheries Proclamation of 1945. See WILLIAM T. BURKE, THE NEW INTERNATIONAL LAW OF FISHERIES 4-9 (1994).

19. Munro & Stokes, supra note 1, at 20. The Fraser River salmon stocks were the focus of U.S.-Canadian negotiations that led to the Bryce-Root Treaty of 1908. However, that treaty did not solve the problem, and it was not until 1930 that the Fraser River salmon stocks were properly dealt with by a treaty, formally known as the Convention for the Protection, Preservation, and Extension of the Sockeye Salmon Fishery of the Fraser River System. Id. at 20-21; see also ELLEN HEY, THE REGIME FOR THE EXPLOITATION OF TRANSBOUNDARY MARINE FISHERIES RESOURCES 263 (1989) (stating that treaty, as amended, was limited to cooperation between Canada and United States with respect to salmon from Fraser River).


21. Because salmon spend a great deal of their lives on the high seas, it has also been necessary to create a high seas conservation regime for salmon. This resulted in, most recently, the 1992 North Pacific Salmon Treaty. For more on that treaty, see Shannon C. Swanstrom, The Trend Towards Eco-System Management in the North Pacific Anadromous Fisheries, 6 COLO. J. INT'L ENVTL. L. & POL'Y 225 (1995); Kelly R. Bryan, Note, Swimming Upstream: Trying to Enforce the 1992 North Pacific Salmon Treaty, 28 CORNELL INT'L L.J. 241 (1995). For the history of regulation of high seas salmon fisheries, see HEY, supra note 19, at 271-74; LOGAN, supra note 20, at 45-47.
American Indian tribes.\textsuperscript{22} As with the current dispute, it was the U.S. parties' divergent and conflicting agendas that almost made the Treaty impossible to negotiate.\textsuperscript{23}

Alaska was concerned that its salmon catch would be reduced under a Pacific salmon treaty. Alaska also feared that a treaty, by facilitating successful claims by northwest American Indian tribes, would lead to further catch reductions.\textsuperscript{24} Furthermore, Alaska and Canada wanted the spawning river states to their south to manage their rivers better so as to allow for replenishment of the salmon stocks, while the northwestern United States and Canada wanted all northward fishing zones to exercise restraint and allow more fish to reach their rivers and their fishing zones.\textsuperscript{25}

A law suit, \textit{Confederated Tribes and Bands of the Yakima Indian Nation v. Baldrige},\textsuperscript{26} which was brought in 1985 by American Indians seeking enforcement of treaties from the 1850s, finally resolved the negotiations after fourteen years of deadlock. That case led to a settlement that remains under judicial supervision to this day. As part of the settlement, Alaska agreed to cooperate in “ratification and effective implementation of the Pacific Salmon Treaty . . . [and] provide for a fair interstate domestic allocation of chinook salmon resources.”\textsuperscript{27} In return, the native tribes agreed that, for the duration of the Pacific Salmon Treaty, they would not initiate any new law suits seeking to enjoin Alaska from catching fish due to the tribes under historic treaties.\textsuperscript{28}

The Pacific Salmon Treaty's purpose is to ensure conservation and equity of catch.\textsuperscript{29} However, due to fluctuations in salmon numbers, the Treaty was

\begin{itemize}
\item \textsuperscript{24} Munro & Stokes, \textit{supra} note 1, at 27-28. Alaska's reasoning was as follows: If there was a Pacific Salmon Treaty that set allocations all along the West Coast, then Pacific Northwest native tribes' salmon rights, as guaranteed under historic treaties, could realistically be included in the total salmon allocations through suit in federal court. If there was no treaty, then any reduction in Alaska's catch made to accommodate native salmon rights would not necessarily accrue to the benefit of the native tribes of the Pacific Northwest as there would be no guarantee that the Canadians would not catch those salmon not previously caught by the Alaskans. Therefore, it was in Alaska's interest to oppose the Treaty so long as Alaska was afraid that Pacific Northwest native tribes would sue for their share of Alaska's salmon. \textit{Id.}
\item \textsuperscript{25} \textit{Id.}
\item \textsuperscript{26} 605 F. Supp. 833 (W.D. Wash. 1985) [hereinafter Baldrige I]. This opinion is essentially the stipulation settlement between the parties, which included the U.S. federal government and the states of Alaska, Oregon, and Washington. The suit sought to enforce certain fishing rights secured by treaties (i.e., the Stevens and Palmer Treaties dating from the 1850s) entered into between the United States and certain Indian tribes.
\item \textsuperscript{27} \textit{Id.} at 834.
\item \textsuperscript{28} \textit{Id.} at 835. This agreement by native tribes not to sue Alaska opened the way for Alaska to allow ratification of the Pacific Salmon Treaty, which had been opposed and effectively blocked by Senator Stevens of Alaska. For a discussion of Alaska's ratification of the Pacific Salmon Treaty, see Munro & Stokes, \textit{supra} note 1.
\item \textsuperscript{29} Pacific Salmon Treaty, \textit{supra} note 1, art. III, para. 1. The relevant portions of the Treaty are: With respect to stocks subject to this Treaty, each Party shall conduct its fisheries and its salmon enhancement programs so as to:
(a) prevent over fishing and provide for optimum production; and
(b) provide for each party to receive benefits equivalent to the production of salmon originating in its waters.
\textit{Id.}
designed to be periodically revised. The Treaty provides that those revisions are to be recommended by the Pacific Salmon Commission, which was created by the Treaty. The Commission is composed of a U.S. section and a Canadian section. The approval of both sections is required to make a decision or a recommendation on issues relating to Pacific salmon. However, the U.S. section’s decisions on allocations of salmon between Alaska and the Pacific Northwest are governed by the stipulation and settlement of the 1985 lawsuit, which requires that allocations can be made only by unanimous consent of all the members of the U.S. section. Furthermore, the stipulation mandates that Alaska be a voting member of the U.S. section. Thus, Alaska has a veto over the Pacific Salmon Commission’s Pacific salmon allocations. This, in turn, is the source of Alaska’s veto power in the recent revision and renegotiation of the Treaty.

These recent renegotiations and revisions to the Treaty have been especially difficult because salmon stocks in both British Columbia and the Northwest have decreased since 1985. The decline is due primarily to increased river pollution and the construction of hydroelectric dams in salmon spawning rivers. Stocks have become so depleted that certain species of salmon may be put on the endangered species list. Until recently, the Canadians asserted that their conservation plans had resulted in increasing the numbers of salmon. However, a recent report has cast doubt on the success of Canada’s conservation of salmon habitats. As if to underscore this report, Canada’s 1995 salmon run was considerably smaller than expected.

Like the 1985 treaty negotiations, the current negotiations have not been easy. Once again, there are too many different constituencies involved. Native tribes in both the United States and Canada seek to protect tribal privileges from any encroachment by a new treaty. On the U.S. side, there are large differences in the agenda between the Alaskan and northwest fishers. For example, Alaskan fishers claim that they should not have to reduce their

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30. Yanagida, supra note 22, at 578.
32. Id. art. II, para. 6.
35. Joel Connelly, Canada Backs Off, Faces its Own Fish Crisis, PORTLAND OREGONIAN, May 14, 1995, at A6. Canada had assumed that because its rivers generally were not dammed they were in better condition than those of Oregon and Washington. However, a recent report by a former Canadian fisheries minister, John Fraser, has shown the appalling conditions of the Canadian salmon habitat. See id.
36. See Mike Crawley, Minister Seeks Aid for Fishers Hurt by Salmon Ban, VANCOUVER SUN, Aug. 14, 1995, at A3. For example, only one-third of the expected numbers of British Columbia’s lucrative sockeye salmon returned in 1995. It is expected that the 1996 salmon run will be as bad as or worse than the 1995 salmon run. See Scott Simpson, West Coast Salmon Fleet Faces Tough Times as Industry Downsizes, OTTAWA CITIZEN, Feb. 5, 1996, at A3.
37. The Canadians believe that one of the main barriers to a new treaty is that the various fishing interests in the United States cannot agree among themselves on a common response to the Canadians’ treaty grievances and demands. See Tobin Announces Advisory Panel On Pacific Salmon, DEP’T OF STATE, OES PRESS GUIDANCE, June 9, 1994, at 1. There are even differences between the agendas of Washington and Idaho. Salmon spawned in Idaho may be protected under Idaho river regulations only to be killed downstream in Washington’s river developments.
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catch because northwest and Canadian rivers are failing to produce salmon, while Alaskan rivers have safely increased their salmon catch numbers. Alaskans assert that their salmon harvest has increased despite the fact that Alaskan fishermen have had to contend with strict conservation measures, Native Alaskan fishing quotas and rights, a significant sport fishing constituency, and the sharing of commercial salmon fishing with fishers from the Northwest.

The U.S. government has its own unique position with regard to the Pacific salmon dispute. The salmon dispute is not the only issue between the United States and Canada. Canada is the United States' number one trading partner and a close ally. Thus, the U.S. government is forced to handle this dispute within the broader picture of its relations with Canada. Yet, the U.S. government, particularly the executive branch, cannot ignore the individual views of U.S. constituencies. These constituencies' positions have become even more important to the Democrat controlled executive since the 1994 November elections when the Republicans took control of Congress and its key committees.

Meanwhile, the northwest fishers claim that they always receive the short end of the stick. They attribute part of the decline in northwest salmon numbers to the fact that many of their fish are caught by Alaskan or British Columbian fishers before they get to northwest waters. Northwest fishers also complain that they have to deal with Canadian retaliation when the salmon dispute heats up. It is primarily the fishers from the Northwest who must travel through the Canadian Inside Passage to get to Alaska, and it is their fish that can be caught by the Canadians in retaliation for alleged Alaskan violations of the Treaty.

The Canadian perspective on this dispute is colored by their experience with the collapse of the Canadian Atlantic fishing industry. By 1992, the once major cod fishery was so depleted that Canada was forced to declare fishing

38. An example of Alaskan fishermen's attitude to the dispute is well set out in a letter to the San Francisco Examiner by Frank Rue, Commissioner, Alaska Department of Fish and Game. See Letters to the Editor, S.F. EXAMINER, Sept. 13, 1995, at A18.

39. Currently, sport fishermen in Alaska are allocated 2% of the statewide catch allowance. Interestingly, even as Alaska is embroiled in litigation and mediation with Canada, other U.S. states, and Native groups, the sport fishing constituency in Alaska is seeking to increase the sport allotment to 5% of the salmon catch. This increase would have raised this year's sport fishermen salmon allotment to 10 million. See Alaskans Fight Over Own Salmon, MORNING NEWS TRIB. (Tacoma, Wash.), Oct. 16, 1995, at B4.

40. In fact, the sharing of Alaskan salmon with Northwest fishers will possibly be subject to negotiation. Senator Stevens, an Alaskan Republican, said, "If we go back to the treaty table, I'm going to ensure we have a residency clause." Southeast Toll Season Opens; Canada Unhappy With Harvest Quotas, AP Political Service, July 3, 1995, available in WESTLAW, Allnewplus Database [hereinafter Southeast Toll Season]. One estimate of the impact of the Washington and Oregon fishermen on the Southeast Alaska salmon fishery states concluded that there are over 1000 Washington and Oregon boats participating in the catch of Southeast Alaska salmon. Hall, supra note 16, at A3.

41. See Chris Wood, The West Coast War, MACLEAN'S, July 17, 1995, at 12. Senator Stevens chairs the Senate Subcommittee on Oceans and Fisheries, while Alaska's one congressman is chairman of the House Committee on Resources. See id.

42. See Ron Judd, For Frustrated Canada, Salmon Fee a Last Resort; U.S. Raking in Big Harvest of B.C. Fish, SEATTLE TIMES, June 19, 1994, at A1.

43. See id. One Seattle journalist remarked: "It's like a guy has a bad day at work, goes home, yells at his wife, she screams at the kid, so the kid goes outside and kicks the cat. We're the cat." Id.
moratoriums that have wreaked havoc on the traditional fishing communities of the maritime provinces. Ottawa has injected large quantities of economic aid to help the region by sending billions of Canadian dollars. Canada is determined to protect its Pacific coast fisheries from the fate of the Atlantic fisheries.

Even before the recent alarming decline in Pacific salmon stocks, Canada had been concerned that the United States was catching too many salmon of Canadian origin. Canada claims that its catch of U.S. salmon fell by 40% in the three years preceding the imposition of the fee, while the United States' catch of Canadian salmon increased by 50% during that same period. According to Canada, this resulted in U.S. fishermen taking six million more salmon in 1993 than the United States had a right to under the most recent salmon treaty. The Canadians also claimed that the United States intended to take an additional two million fish in 1994. Canada's Minister for Fisheries and Oceans at the time of the transit fee, Brian Tobin, said that "[w]e are not going to give free passage to a nation that has indicated its intention to take two million more fish this year [1994] than last year, thus raising the inequity from six to eight million."

The Canadians erroneously claimed that it was unfair that their recently recovered salmon stocks should suffer just because of the failure of northwest conservation measures. The Canadian Fisheries Minister said that "Canadians have protected their salmon resource and have made substantial investments to increase abundance. U.S. authorities have made other choices and the result has been steady declines of coho and chinook returning to Washington and Oregon." The Canadians feared that this U.S. conservation failure would increase the inequities already present in the Pacific salmon catch allocations. Thus, by early 1994, the Canadians perceived that they were facing a crisis on the Pacific coast that could parallel their Atlantic fisheries disaster.

44. See Turner, supra note 7, at 3. One in four people in Newfoundland is currently unemployed as a result of the decline of the traditional Atlantic fisheries.

45. See Crawley, supra note 36, at A3.

46. See Anne Swardson, Canada Sets Stiff Fee for Salmon Boats, WASH. POST, June 16, 1994, at A42.

47. See Canada and U.S. to Resume Stalled Salmon Talks, available in WESTLAW, Int. News Library, Reutr. File. This salmon was estimated to be worth roughly $50 million.

48. Licence Fee, supra note 2, at 1. Minister Tobin had been the driving force behind Canada's active, and at times aggressive, fisheries policy. In January 1996, when Tobin resigned to become Premier of Newfoundland, he was replaced by Fred Mifflin, a retired admiral in the Canadian Navy. Averting Salmon War, PORTLAND OREGONIAN, Feb. 13, 1996, at C6. For a Canadian view of the Pacific Salmon Treaty (and for a Canadian view of the legality of the transit fee), see McDorman, supra note 23.

49. According to a recent Canadian government report, the Canadians were operating under a misconception regarding Canada's conservation record. In fact, the Canadian salmon spawning habitat had suffered extensive environmental damage in recent years that only now is being felt in the form of decreased salmon returns. The report was headed by former fisheries and environment minister, John Fraser, and is referred to as the Fraser Report. See Connelly, supra note 35, at A6.

50. Licence Fee, supra note 2, at 1. These choices refer to the decision to build hydroelectric dams on salmon spawning rivers, and to industrialization in general, that have harmed salmon spawning habitats. As the Fraser Report suggests, Canada has also been guilty of some of these same faults.
C. The Inside Passage Transit Fee

During the salmon treaty negotiations in early 1994, Canada concluded that the United States was not seriously responding to Canada’s urgent concerns. Tobin blamed the United States for the failure of the negotiations. Accordingly, he decided to take decisive action to force the United States seriously to address Canada’s concerns. Tobin hoped to force the U.S. federal government to make the various U.S. parties resolve their differences in order to improve the possibility of negotiations with Canada. In addition, Tobin wanted to bring the conservation issue to the attention of the U.S. public.

Accordingly, on June 15, 1994, Canada imposed a transit fee on all U.S. commercial fishing boats using the Canadian Inside Passage. This waterway, otherwise known as the Inland Passage or Marine Highway, is a natural sheltered route that runs through channels and straits between British Columbia’s islands and mainland British Columbia. The Passage provides shelter from the fierce North Pacific storms for small to medium sized vessels travelling between Washington and Alaska. The Canadians considered the fee a particularly apt method to deal with the salmon treaty problem. They felt that it would impose a burden on those who, in Canada’s opinion, were going to purloin Canadian fish, and that it also would catch the attention of the U.S. media.

Enforcing the fee was perhaps the easiest aspect of the whole dispute for Canada. Canada mobilized a large fleet in the Inside Passage to ensure that all U.S. commercial fishing boats paid the fee. The area patrolled was not very large, and U.S. boats were easily spotted. The Canadian officer in charge of enforcement at the southern end of the passage correctly boasted that “they can’t get by us here.” The Canadians used fast, rigid-hulled inflatable boats, numerous conventional craft, helicopters, and land based stations to spot and stop any U.S. boat that did not display the fee decal on

51. Tobin Announces Advisory Panel On Pacific Salmon, CANADA DEP’T OF FISHERIES AND OCEANS, NEWS RELEASE/COMMUNIQUE NR-FR-94-28E, June 9, 1994. For the 1994 salmon fishery, negotiations with U.S. representatives have produced no substantive progress on two key treaty principles: fishery conservation and the fair balance of interceptions by each country’s fishers. The United States has made no practical proposal on either of these principles. . . . [Mr. Tobin said,] ‘Negotiations with the United States on fishing arrangements for 1994 have been frustrated by divergent positions within the U.S. delegation. This has called into question the negotiating process and led to the current stalemate.’

52. Id. (“One thing is obvious. We need to take a strong stand to bring the United States back to the table for meaningful negotiations.”) (quoting Minister Tobin).


54. See supra Figure 1 (points 13, 12, 6, 5, 10, and 7).

55. See Licence Fee, supra note 2, at 1. The Minister noted that “it is impossible to conduct business as usual with U.S. vessels when some are traversing Canadian waters to overfish more Canadian-origin fish in 1994 than they did in 1993.” Id.

the boat's wheel house.57

When U.S. salmon fishers first heard of the proposed fee, they did not believe that the Canadians would actually enforce compliance. Many fishers based in the Pacific Northwest left for Alaskan fishing grounds without the necessary fee vouchers affixed to their boats. 58 Some boats did not even have the correct form of payment; they either had U.S. dollars or they hoped to pay by check, neither of which was acceptable. 59 Those boats without the fee decal were shocked to find armed Canadian patrol boats and helicopters blocking their passage to Alaska. They were forced to go directly to the nearest Canadian port to pay or to wait for funds to arrive by wire before they were allowed to proceed. 60 Fishers in Seattle who did try to pay the fee had to travel at their own expense, prior to sailing, to the nearest Canadian port where payment would be accepted, pay the fee, and then return to Seattle.

Overall, the fee created substantial costs in time and resources for both the Canadians, through enforcement costs, and the U.S. fishers, through the actual cost of the fee and through lost time involved with the fee. 61 By the time the fee was lifted, approximately three hundred boats had paid the fee, including a few boats returning south from Alaska to the lower forty-eight states. 62 Very few fishermen risked the dangers of the alternative open sea route to avoid paying the fee. 63 The cost and inconvenience suffered by the U.S. fishers were communicated to the U.S. government, which reacted quickly to the Canadian action.

D. The U.S. Government's Reaction to the Fee

1. The Executive Branch

The fee elicited a reaction from both the State Department and the Vice President. Each had a separate role in the resolution of the fee dispute. The State Department presented the official U.S. condemnation of the fee while the Vice President worked behind the scenes to resolve the dispute as quickly and efficiently as possible. The State Department's initial reaction to the fee was to assert
"conclusively that the fee is inconsistent with international law." The Department did not specifically articulate the reasons for the fee's illegality; it merely stated that the fee was "inconsistent with rights guaranteed to vessels under customary international law as reflected in the 1982 United Nations Convention on the Law of the Sea." In addition, the State Department pointed out that the fee also violated Canada's transit and nondiscrimination obligations under GATT and NAFTA. Finally, the State Department added that the fee violated a host of unnamed Canadian commitments to the United States. In its early criticism of the Canadian action, the State Department probably did not want to be too specific, for both diplomatic and legal reasons. Tensions would have increased between the two countries had the State Department conclusively indicted the Canadian government.

Nevertheless, the State Department unequivocally rejected Canada's justifications for imposing the fee. The State Department responded to Canada's claim that the United States had not participated in the treaty negotiations by asserting that Canada "ha[d] rejected all U.S. efforts to find a compromise on this issue and ha[d] thus far been unwilling to swerve from a negotiating strategy that would result in the closure of traditional U.S. fisheries." The State Department also claimed that Canada was oversimplifying the issues surrounding northwest salmon conservation and management. The Department turned Canada's accusation on its head and claimed that, in fact, the Canadians were damaging U.S. conservation efforts by continuing to fish the endangered salmon species that the Northwest had closed to fishing in order to build up stocks.

The State Department also rejected Canada's claim that the United States was unwilling to help with Canada's salmon conservation management. The Department noted that Canada had only listed one endangered salmon stock and that the United States had offered to help Canada come up with a joint plan to conserve that species. The State Department asserted that, unlike the Washington and Oregon stocks, the Canadian stocks had been "returning in record numbers." Furthermore, the State Department claimed that the Canadian conservation success was the product of a joint effort by Canada and the United States, a joint effort that the State Department said was also

64. Canada's Transit Fee, DEP'T OF STATE, OES PRESS GUIDANCE, June 15, 1994, at 1 [hereinafter Canada's Transit Fee].

65. Id. The "as reflected" language above highlights the fact that the United States has not signed the UNCLOS but, for the most part, has accepted it as embodying customary principles of international law. The exceptions are not applicable to this dispute. For the fee's illegality under the UNCLOS, see Part III.A.1.

66. Canada's Transit Fee, supra note 64, at 1. For the fee's illegality under GATT, see Part III.A.2.a.

67. Canada's Transit Fee, supra note 64, at 1.

68. Equity Issue Under the Pacific Salmon Treaty, DEP'T OF STATE, OES PRESS GUIDANCE, June 10, 1994, at 1

69. Id.

70. Conservation Issue Under the Pacific Salmon Treaty, DEP'T OF STATE, OES PRESS GUIDANCE, June 10, 1994, at 1 ("[P]opulations of U.S. stocks of chinook and coho salmon . . . are seriously depressed this year. Some of these stocks are already listed under the Endangered Species Act.").

71. See id. The endangered Canadian salmon stock is the early skeena coho.

72. See id. Like the Canadians, the U.S. State Department erroneously believed that Canada's conservation efforts had been successful.
essential for generally rebuilding northwest stocks.\textsuperscript{73}

The State Department attempted to resolve the dispute through diplomatic channels and left the issue of reimbursement and retaliation to Congress.\textsuperscript{74} This left the Department free to work on the removal of the fee.

In order to expedite the removal of the fee, the State Department appealed to President Clinton to help with the increasingly tense situation. Vice President Gore was given the task by the White House. In an act that underscored the seriousness of the situation, Gore first met to discuss the dispute with the National Security Council.\textsuperscript{75} He then met with the highest levels of the Canadian government and quickly and peacefully resolved the issue by promising that the United States would return to the negotiating table in an effort to resolve the underlying Pacific Salmon Treaty issues.\textsuperscript{76} Since the resolution of the fee dispute, the State Department and Gore have continued these efforts.\textsuperscript{77}

2. \textit{The Legislative Branch}

Congress reacted quite vocally to the imposition of the fee. The fishing industry supplies one of the nation's primary food sources, and the industry supports numerous constituencies. Even today, the Alaskan salmon fishery is the nation's most important. The strong congressional response was, therefore, no surprise.\textsuperscript{78}

The political representatives of those connected to this important industry responded to the Canadian transit fee quickly and passionately. A few senators proposed that the U.S. Coast Guard escort U.S. fishing boats through the Canadian Inside Passage.\textsuperscript{79} They also individually denounced the Canadian action as inconsistent with international law and with Canada's obligations to the United States as embodied in many treaties and agreements. Both houses of Congress condemned the fee as a threat to the safety of U.S. fishing boats that sought to avoid the fee by traveling through the more dangerous open

\textsuperscript{73} Effectiveness of the Pacific Salmon Treaty, DEP'T OF STATE, OES PRESS GUIDANCE, June 10, 1994, at 1 (“Canada has done an excellent job rebuilding Fraser [River] stocks from near extinction earlier this century. The United States has been instrumental for decades in this effort. . . . The United States now needs that kind of Canadian cooperation in turning around the dramatic decline in depressed U.S. stocks.”).

\textsuperscript{74} Now that the amendment to the Fishermen's Protective Act has passed, it is the U.S. State Department that will be responsible for reimbursing those fishers who paid the transit fee.

\textsuperscript{75} National Security Council Will Enter Salmon Dispute, MORNING NEWS TRIB. (Tacoma, Wash.), June 18, 1994, at B7.

\textsuperscript{76} Truehart, supra note 9, at A29.

\textsuperscript{77} The State Department is still involved in ongoing negotiations and meetings with the Canadians to resolve the dispute. Averting Salmon War, PORTLAND OREGONIAN, Feb. 13, 1996, available in WESTLAW, Allnewsplus Database.

\textsuperscript{78} One U.S. official observed that “'fish have much more active political constituencies than Bosnia or Rwanda. We are talking about jobs and incomes, matters near and dear to the hearts of legislators.'” Truehart, supra note 9, at A29.

\textsuperscript{79} See, e.g., Richards, supra note 13, at A1 (citing comments by Senator Slade Gordon (R-Wash.)); Charles Truehart, U.S., Canada to Renew Talks on Fishing Treaty; Ottawa Agrees to Scrap Disputed Transit Fee, WASH. POST, July 3, 1994, at A25 (citing comments by Senator Frank Murkowski (R-Alaska)).
waters of the North Pacific.\textsuperscript{80}

Although the popular conception is that the President is responsible for foreign policy, Congress has considerable authority in this area.\textsuperscript{81} Thus, the reaction of Congress to the fee should not just be disregarded as election year politicking. Congress' reaction to the Canadian fee was embodied in an amendment to the Fishermen's Protective Act of 1967 (FPA).\textsuperscript{82} Congress first approached the subject in the heat of the moment, when U.S. boats were being stopped and taken to Canadian ports to pay the fee. Both houses attempted to amend the FPA in such a way as to deal with the Canadian fee, but were unable to reconcile their language in time for the bill to be voted on while the incident was still an urgent issue. The amendment to the FPA was finally passed by Congress on October 24, 1995.\textsuperscript{83}

The 1967 FPA originally was designed to deal with the illegal seizure of U.S. fishing boats by a foreign government. The FPA provides that U.S. fishers can be directly reimbursed by the U.S. government for the fines and other costs associated with illegal seizures by foreign governments.\textsuperscript{84} However, the FPA did not cover the reimbursement of illegal transit fees imposed on U.S. fishing boats. The amendment, which was tailored to apply to the Canadian fees, rectifies this omission.\textsuperscript{85} The amendment also directs the Secretary of State to take action to recover that reimbursement from the offending country.\textsuperscript{86} Those fishers who were forced to pay the transit fee to Canada will be reimbursed by the U.S. government. The U.S. government will then try to get that money back from Canada. This arrangement sparked the recent renewal of the fee dispute.

\textsuperscript{80} The amendment to the Fishermen's Protective Act found that:

[T]his action was inconsistent with international law, including the United Nations Convention on the Law of the Sea, and, in particular, Article 26 of that Convention, which specifically prohibits such fees, and threatened the safety of United States commercial fishers who sought to avoid the fee by traveling in less protected waters.

\textsuperscript{141} This action was inconsistent with international law, including the United Nations Convention on the Law of the Sea, and, in particular, Article 26 of that Convention, which specifically prohibits such fees, and threatened the safety of United States commercial fishers who sought to avoid the fee by traveling in less protected waters.

\textsuperscript{81} While it is true that the executive has gradually become preeminent in foreign affairs, the Constitution still grants to Congress the power to set duties, see U.S. CONST. art. I, § 8, cl. 1; the power to regulate foreign commerce, see id. art 1, § 8, cl. 3; the power "to define and punish Piracies and Felonies committed on the high Seas, and Offences against the Law of Nations," see id. art. 1, § 8, cl. 10; the power to declare war, see id. art 1, § 8, cl. 11, and grants the Senate the power to ratify treaties and appoint ambassadors, see id. art II, § 2, cl. 2.


\textsuperscript{83} See 141 CONG. REC. D1244 (daily ed. Oct. 25, 1995). However, had there been an immediate need for the amendment, it would have been ready to be voted on at any time. The language of the amendment was basically unchanged from July 1994 to October 1995.


In any case on or after June 15, 1994, in which a vessel of the United States exercising its right of passage is charged a fee by the government of a foreign country to engage in transit passage between points in the United States (including a point in the exclusive economic zone or in an area over which jurisdiction is in dispute), and such fee is regarded by the United States as being inconsistent with international law, the Secretary of State shall, subject to the availability of appropriated funds, reimburse the vessel owner for the amount of any such fee paid under protest.

\textsuperscript{86} Id. sec. 402(a), § 11(e) ("The Secretary of State shall take such action as the Secretary deems appropriate to make and collect claims against the foreign country imposing such fee for any amounts reimbursed under this section.").
Just requiring Canadian reimbursement of the fee would not stop Canada or another country from imposing a similar fee in the future. Accordingly, Congress included language in the amendment that effectively engaged in a "tit for tat" strategy with any country whose illegal transit fees hurt U.S. fishing boats.\(^8\) The amendment directs the President to "impose similar conditions" on an offending state's vessels.\(^8\) However, the ultimate determination of whether the amendment applies to a particular transit fee lies in the hands of the executive branch. It is up to the discretion of the executive branch whether to label a transit fee a violation of international law to which the FPA amendment provisions would apply.\(^8\)

The amendment also addresses the Canadian action. Discussing the Canadian fee explicitly, the amendment directs the President to insure that the U.S. Coast Guard can protect U.S. fishers, enforce the law, and keep the peace in the Northwest.\(^7\) Furthermore, the amendment directs the President to review all relations between the two countries with an eye toward persuading Canada not to impose a fee again.\(^9\) In addition, the amendment enables the President to take particular action against Canada if it reinstates the fee.\(^9\) This directive could have had ominous consequences if the dispute had not been quickly resolved.

When Canada imposed the fee in June 1994, it caught Congress napping. Canada was able to exploit congressional inertia and use the fee before Congress could adequately respond. Now that the amendment to the FPA is law, it is doubtful that Canada or any other state would use such a transit fee against U.S. fishing vessels.

The United States was able to take two different approaches to the

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\(^8\) See id. sec. 402(b), § 12.

\(^7\) Id. sec. 402(b), § 12(b) ("[T]he President shall direct the heads of Federal agencies to impose similar conditions on the operation or transit of fishing vessels registered under the laws of the nation which has imposed conditions on United States fishing vessels.").

\(^9\) See id. § 402(b).

\(^9\) Id. § 401.

The Congress finds that . . . the President should ensure that, consistent with international law, the United States Coast Guard has available adequate resources in the Pacific Northwest and Alaska to provide for the safety of United States citizens, the enforcement of United States law, and to protect the rights of the United States and keep the peace among vessels operating in disputed waters . . . .

\(^9\) Id.

The Congress finds that . . . the President should continue to review all agreements between the United States and Canada to identify other actions that may be taken to convince Canada that any reinstatement of the transit license fee would be against Canada's long-term interests, and should immediately implement any actions which the President deems appropriate if Canada reinstates the fee; . . . the President should continue to convey to Canada in the strongest terms that the United States will not now, nor at any time in the future, tolerate any action by Canada which would impede or otherwise restrict the right of passage of vessels of the United States in a manner inconsistent with international law . . . .

\(^9\) Id. ("[The President] should immediately implement any actions which the President deems appropriate if Canada reinstates the fee."). This congressional authorization is particularly important for the powers of the President. See Justice Jackson's important concurring opinion in Youngstown Sheet & Tube, which asserts that where Congress has spoken on a particular subject, the Executive may act so as to carry out Congress' desire without further immediate consultation with Congress. Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 578, 635-36 (1951) (Jackson, J., concurring).
Canadian fee due to the separation of powers in the U.S. government. Congress was able to pursue a unilateral, aggressive response to the fee, while the executive branch pursued a bilateral, negotiated resolution of the fee. Other countries are aware of the United States' separation of powers and are not surprised when the executive branch and legislature pursue different and independent strategies to address a dispute. Consequently, during the fee dispute, it was perfectly reasonable that the executive and legislative branches pursued different approaches to the Canadian fee.

However, had Congress managed to pass the amendment to the FPA during the dispute, it would have forced the executive branch to decide whether to employ the amendment's unilateral responses to the Canadian transit fee. Because the executive branch was not constrained by the amendment, it could work on removing the fee peacefully through bilateral negotiations with Canada.

3. The Pacific Salmon Dispute After the Fee

Fortunately, the fee was lifted through peaceful bilateral negotiations. There were no violent incidents between U.S. fishing boats and Canadian enforcement officials. However, there was an unavoidable escalation of tension in the region. The tension was most problematic along the disputed northern boundary of the passage at Dixon Entrance. For the first time since July 1992, a Canadian vessel was seized in the Dixon Entrance by the U.S. Coast Guard for allegedly fishing in those disputed waters. Even though both parties claimed that the incident was not related to the transit fee dispute, the seizure highlighted the potential for a rapid escalation of tensions if the dispute were not quickly resolved. No doubt this escalation contributed to the resolution of the immediate problem posed by the fee. Three days after the Dixon Entrance incident, Canada and the United States reached an agreement that led to the rescission of the fee. The Canadians removed the fee after Gore promised that the United States would return to the bargaining table for further negotiations.

The renewed July talks were no more successful than those at the beginning of 1994. After a few days, the talks collapsed. During this new impasse, Canada instituted a very aggressive fishing policy, “Canadian Fishery on Canadian Stocks,” under which the Canadians attempted to catch Fraser River salmon before they could reach U.S. waters and be caught by

93. Based on the author's experience in Alaska, this fear was not groundless; considering that numerous fishing boats carry small arms, and some fishing boats have resorted to those arms in the past.

94. See Klass, supra note 59, at D1. There was evidence of increasing tension in the area as the fee continued to be applied. One U.S. citizen involved in the dispute summed up the tension: “This is what started the [W]ar of 1812, foreign vessels boarding U.S. vessels and searching them . . . . This thing's gotten really sneaky, and I'm really afraid that some hothead is going to do something crazy.” Id.

95. For a discussion of the dispute between the United States and Canada over Dixon Entrance, see Donald McRae, Canada and the Delimitation of Maritime Boundaries, in CANADIAN OCEANS POLICY: NATIONAL STRATEGIES AND THE NEW LAW OF THE SEA, supra note 1, at 145, 147-48; supra Figure 1.


97. See id.; Truehart, supra note 9, at A29.
U.S. fishers. This policy resulted in the catch of more fish than was warranted, given the low stocks of salmon. However, fear that this policy would be repeated in 1995 effectively destroyed the Northwest’s resistance to a negotiated settlement with Canada. Senator Patty Murray, a Democrat from Washington state, summed up the Northwest’s attitude towards Canada’s aggressive fishing policy by stating, “If we don’t get a treaty with Canada, and they decide to fish us out, everything we do to save salmon will be for naught.”

Once the fee was rescinded and the resultant talks failed to satisfy Canada, there was a possibility that Canada would reinstate the transit fee. At that time, there were occasional voices within the Canadian government that called for this extreme action. Nonetheless, the fee was not reinstated either in 1994 or in 1995, even though Canada once again felt that the United States had failed to address Canada’s concerns.

There are many possible reasons why the Canadians did not reinstate the transit fee in those years. First, Canada had achieved its immediate goal — the return of the United States to the bargaining table with a commitment to engage in good faith negotiations. Second, the amendment to the Fishermen’s Protective Act would have been applied to any new Canadian fee. That amendment would have resulted in significant inconvenience to Canada’s merchant fleet and would also have led to an escalation of tensions that the Canadians were unwilling to allow. In addition, by the start of the 1995 fishing season, it should have been quite evident to Canada that both the Northwest and the U.S. government were seriously trying to negotiate a new salmon treaty and, hence, that there was no need for aggressive Canadian action against those parties.

Rather, it was Alaska’s refusal to join in the interim conservation plan that was the main obstacle in 1995. The fee was not an effective tool against Alaska as it generally did not affect many Alaskan

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100. See Talks Go Nowhere, supra note 98, at D6 (“[Canada’s negotiator with the Pacific Salmon Commission, Jack Nichol, . . . said Canada should reinstate the [United States] $1100 fee . . . .”).

101. For details of how that amendment would hurt Canada, see Part II.D.2 of this Article. In addition, one study of this dispute claimed that Canadian fear of an oil pollution levy on Canadian vessels using the Strait of Juan de Fuca contributed to the Canadian rescission of the fee. See McDorman, supra note 23, at 503 n.177; see also Wayne Hottenbach, Rough Waters in the Straits of Juan de Fuca, 10 OCEAN POL’Y NEWS 1, 6-7 (1993).

102. Southeast Toll Season, supra note 40. As mentioned earlier in note 99 and its accompanying text, the Northwest was effectively neutralized due to its fear of a repeat of Canadian aggressive fishing of “Northwest” salmon. “If there is no treaty, Canada has said it would be within its rights to ‘maximize’ interception of salmon headed to spawn in Northwest rivers.” Connelly, supra note 99, at A1. Furthermore, Tobin said that he did not “want to take action that would penalize native groups and commercial fishermen in the Pacific Northwest that had agreed with Canada on conservation measures.” Id.; see John Urquhart, State’s Refusal to Accept Limit on Catch of Fish Criticized As Hindering Conservation, WALL ST. J., July 5, 1995, at B6.
Similarly, Canadian aggressive fishing in 1994, apart from damaging Canada's own fragile salmon stocks, did not result in a large immediate impact on Alaska. Hence, for all his strong talk, Tobin probably never intended to reinstate the fee or the aggressive fishing policy.

Once the 1994 fishing season was over, talks resumed between the two countries. One proposal suggested by the United States would have resulted in the United States paying Canada a cash sum to settle past inequities in salmon harvests. In return, there would be a new method of calculating quotas to insure a more rigid conservation mechanism for the future. However, Canada and the United States were unable to come to any agreement over these proposals. At that point, the parties realized that outside mediation was necessary to resolve the dispute.

With the long term solution to the dispute unresolved, the parties focused on a short term interim agreement to cover the 1995 salmon season. This interim agreement also appeared to be destined to fail once it became apparent that the Alaskans were going to refuse to restrict their catch to the low levels required under the agreement. The interim agreement required that Alaska cut its catch of chinook salmon to 140,000 for 1995. Alaska rejected this figure in favor of its own scientists' calculations, since those would allow Alaska a larger catch without endangering the salmon stocks. Relying on its own assessment of the salmon situation, Alaska unilaterally decided to allow a catch of over 230,000 chinook salmon. Even though Alaska refused to take part in the conservation measure, Canada felt that for the good of the salmon stocks it had to introduce significant cuts in its own salmon catch allowances. For the 1995 salmon fishing season, Canada cut its chinook catch from over 200,000 to 60,000 while at the same time reducing its other salmon allocations. Vice President Gore pleaded with the Alaskans to drop their catch to just 200,000 chinook, but Alaska Governor Tony Knowles

103. This is not strictly accurate, as many of the fishing boats that were forced to pay the fee were Alaskan boats returning to Alaska after having carried out work in Seattle. However, in comparison to the total number of salmon fishing boats, it was not a significant number.

104. Consider this example of Tobin's "strong talk": "This situation is not acceptable to the Government of Canada. Canada will respond. And all options are on the table." Wood, supra note 41, at 12. The aggressive fishing policy would also have had no immediate affect on Alaska. This Article will not examine the legal and moral/ethical issues surrounding Canada's decision to overfish an endangered fish stock. No doubt a whole article could be written focusing just on the aggressive fishing in 1994.


107. Id.


109. Id. This case describes the difference between Alaska's method of calculation and the other parties' methods of calculating the numbers of salmon that could safely be caught. In the end, Judge Rothstein ruled that Alaska's method was unproven and hence should not have been relied on given the dangerous condition of the salmon stocks.

110. Southeast Toll Season, supra note 40.

111. See Tobin Should Stand Firm, supra note 8, at 8.
refused to go below 230,000. In short, all attempts to persuade the Alaskans to join in the interim agreement failed. Alaska's refusal to join the interim agreement resulted in a great deal of speculation that Canada would repeat its aggressive policy of the previous year. In the period between the 1994 and 1995 salmon seasons, Canada attempted to show a tough face to the United States. However, it was apparent to Canada that a new nonconfrontational policy was necessary in the wake of the near collapse of Canada's fishing resources. By the spring of 1995, Tobin had significantly toned down his aggressive stance. Other than an impromptu attempt by Canadian fishers to stop an Alaskan ferry, the Canadians did not repeat the previous year's confrontational policies. Thus, when the 1995 salmon season started, it appeared as though Alaskan fishers would again take their potentially destructive salmon quota.

4. The Dispute Goes to Court

While Alaska could get away with ignoring the other parties, it could not ignore the power of the U.S. judiciary. In the summer of 1995, the Pacific Northwest native tribes used the federal courts to assert their historic fishing rights, as they had done in the original Pacific Salmon Treaty. Throughout the dispute, native tribes from the Pacific Northwest had warned that, if their needs were not met, they might return to the litigation tactics of the previous decade to enforce these needs. Accordingly, they filed suit in federal district court — with Canada and the states of the Northwest as amici curiae — seeking a preliminary injunction to close Alaska's southeast chinook fishery. They sought to enforce the 1985 Baldrige settlement agreement, which enforced treaty obligations due those tribes dating from the 1850s.

Alaska sought to have the suit dismissed, claiming that the court did not have jurisdiction to enforce the Pacific Salmon Treaty, and that even if it did,
Alaska's conduct was not in violation of that treaty. Judge Rothstein first ruled that the issue was not whether the court had jurisdiction to determine issues involved in the Pacific Salmon Treaty but whether Alaska had violated the settlement agreement resulting from the 1985 suit, a contract between Alaska and the plaintiffs.119 Having determined that the issue was contract interpretation, Judge Rothstein ruled that the court had jurisdiction to hear the suit.120 Judge Rothstein then examined the merits of the case and issued an injunction prohibiting commercial fishing by most of Alaska's southeast salmon fisheries.121 The injunction halted the fishing of the last 55,000 chinook salmon of Alaska's controversial 230,000 quota.122 In addition, the injunction will force Alaska to return to the bargaining table but with a reduced veto power and an incentive to resolve the dispute.123 Unless there is a resolution to the salmon dispute, Alaska will face the possibility of a similar costly injunction next year. Alaska has appealed the ruling, but the Ninth Circuit's decision will be handed down too late to affect the 1995 salmon season. Moreover, a reversal would only bolster Alaska's power in the salmon negotiations. Thus, once again U.S. courts have it in their power to help resolve the Pacific salmon dispute. However, it should not be forgotten that this power results from the courts' role in adjudicating rights between parties based on earlier settlements. In other words, the courts are merely enforcing a contract, not making international law or policy.

The dispute has also been adjudicated by an international mediator, Charles Beeby, New Zealand's former ambassador to France.124 In September 1995, both parties agreed to submit the dispute to nonbinding mediation.125 However, when Beeby finally delivered his recommendation in January 1996, the United States rejected his proposals. Once again, the Canadians were upset at the United States' negotiating posture,126 and thus the 1996 salmon negotiations got off to a shaky start.

In March 1996, following publication of the amendment to the FPA, there were calls within Canada for a tough stance towards the United States. For example, the recently elected British Columbian premier called for the

120. Id. at 1484.
121. Specifically, the preliminary injunction prohibited "the State of Alaska from authorizing directed marine chinook salmon fisheries or authorizing the retention of chinook salmon in marine fisheries south of Cape Suckling for the remainder of the accounting year which ends September 30, 1995." Id. at 1479.
123. Baldrige II, 898 F. Supp. at 1477. On hearing of the successful conclusion of the suit, Tobin remarked, "This is victory for conservation and common sense and puts an end to the notion that one of the partners in a multi-stakeholder partnership can dictate the terms of the fishery to all other stakeholders." Tobin Praises Court Ruling on Alaska Salmon Fishing, ECO-LOG WK., Sept. 15, 1995, at 1.
125. Unité to Save Salmon, supra note 106, at A2. This was also a compromise in that the Canadians wanted the equity issue to go to binding arbitration, while the United States was not happy about bringing in any outsiders.
126. Hogben, supra note 124, at B8. "To put it mildly, Canada is very frustrated, very disappointed that the U.S. engaged in this process as we did in Canada, but has refused to entertain the suggestions made by this eminent person . . . ." Id. (quoting Canada's chief negotiator, Yves Fortier).
reintroduction of the transit fee: "It is my contention that British Columbia and Canada cannot tolerate this incursion on Canadian sovereignty . . . and a transit fee should be reimposed in order to get the Americans to take seriously their obligations for conservation of salmon in these waters."\(^\text{127}\)

III. THE LAW

This section of the Article examines the legality of the transit fee under traditional international law, under treaty law, and under the emerging customary international law doctrine of countermeasures. The examination will reveal that under traditional international law, the fee would be considered illegal. However, when the doctrine of countermeasures is brought into the equation, Canada's breach of its traditional international law obligations is transformed into a legitimate action by a state involved in a dispute. Canada's Inside Passage transit fee can then be considered a justified infraction of Canada's treaty law obligations.

A. International Treaty Law and the Fee

The legality of a state's action should first be examined with regard to the relevant treaties. Thus, the Canadian Inside Passage transit fee will be examined under Canada's international treaty obligations. In this incident, the treaty that is primarily relevant is the UNCLOS. The transit fee is first and foremost a restriction on marine traffic in furtherance of Canada's oceans policy. Hence, the UNCLOS, as the preeminent international law on the sea, will be the main focus of this section's examination of the Canadian transit fee. To a lesser extent, the GATT is applicable. Finally, the Vienna Convention on the Law of Treaties (Vienna Convention), is necessary to the determination of the fee's legality under treaty law because it can help in interpreting the above treaties.

1. The Legality of the Fee Under the UNCLOS

a. Introduction

U.S. boats have been using the Inside Passage for over a century.\(^\text{128}\) The passage was extensively used by the United States during the Klondike and Alaskan gold rushes at the turn of the last century. Today, the Inside Passage is the main route for northwest fishing boats travelling to the rich fishing grounds in Alaska and is the preferred route for Alaskan boats going to Seattle for major repairs. The Inside Passage channels provide a safe and

\(^{127}\) See Joel Connelly, B.C. Talks Tough on Getting Fish Treaty, Premier Clark Wants to Imose Fee on U.S. Boats, SEATTLE POST-INTELLIGENCER, Mar. 12, 1996, at A4 (quoting B.C. Premier Glen Clark). The dispute now is focusing on the nature of the Inside Passage — whether it is internal waters, as the Canadians claim, or territorial seas, as the United States claims. See Jacques Lemieux, Canada, US Squaring off in New Salmon War, AGENCE FRANCE-PRESSE, Mar. 9, 1996, available in WESTLAW, Allnewplus Database; see also infra Part III.A.1.

\(^{128}\) Fishermen Fume, supra note 3, at A1.
sheltered passage for the small U.S. commercial fishing boats travelling between the Pacific Northwest and southeast Alaska. These boats comprise a large share of all the fishing boats in Alaska and take part in the lucrative commercial fisheries of salmon, black cod, halibut, herring, pollack, and crab. The passage also is used by ferries and cruise ships that ply the larger sections of the Inside Passage from Seattle to Alaska.

The alternative route between Alaska and the Northwest is through the open waters of the North Pacific. This route is particularly rough, unpredictable, and dangerous for most salmon fishing boats as they tend to be quite small, on average only forty feet long. Every year, about one thousand U.S. fishing boats go up to Alaska to fish. The fact that most of those boats use the busy Inside Passage with its many narrow channels and straits, in preference to the unobstructed open sea routes, is evidence of the passage’s utility.

As noted above, the primary law that governs maritime disputes is the UNCLOS. Both the United States and Canada are bound by the pertinent provisions of the UNCLOS as they affect this dispute. Although it has not signed the convention, the United States has asserted that, for the most part, the UNCLOS has become customary international law. Canada was one of the first states to sign on to the UNCLOS, and, although it has not yet ratified it, Canada is most likely bound by the provisions pertinent to this dispute. Thus, an examination of the Canadian transit fee under the UNCLOS regime should shed light on the legality of such a fee.

The UNCLOS provides different legal regimes for different zones of the sea. For example, the territorial sea is treated differently than internal waters. In particular, there is no guaranteed right of innocent passage through internal waters. However, as will be shown below, due to the unique situation of large stretches of the Inside Passage, it appears that U.S. commercial fishing boats have a right of innocent passage through those stretches regardless of the Inside Passage’s designation — whether the Inside Passage is internal waters or territorial seas.

The inquiry in this section will focus on the right of innocent passage through the Inside Passage, whether the fee is an acceptable infringement of innocent passage, and whether the U.S. fishing boats’ transit was innocent as

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130. UNCLOS, supra note 4.
131. Statement on United States Ocean Policy, 1 PUB. PAPERS 378-79 (Mar. 10, 1983) (statement of President Reagan). However, President Reagan’s partial acceptance of the UNCLOS has led to questions concerning the United States’ role in the formal UNCLOS dispute resolution section. See W. MICHAEL REISMAN & GAYL S. WESTERMAN, STRAIGHT BASELINES IN MARITIME BOUNDARY DELIMITATION 226-27 (1992). Because the UNCLOS governs the United States’ obligations, the Supremacy Clause of the U.S. Constitution, U.S. CONST. art. VI, compels that the UNCLOS, and any other international treaty to which the United States is a party, also governs subpolitical entities such as the individual states.
132. JOSEPH SWEENEY ET AL., CASES AND MATERIALS ON THE INTERNATIONAL LEGAL SYSTEM 160 (3d ed. 1988). Canada signed the Convention on December 10, 1982. “[W]hen all the interested parties have carefully negotiated and accepted a regime without dissent in a consensus document, it can become a part of customary international law, thereby binding all states.” McDorman, supra note 23, at 485.
133. Thus, the recent argument between the United States and Canada over the nature of this body of water is irrelevant to the issue of the fee’s legality. See Lemieux, supra note 127.
that term is applied in each of the different sea zone regimes. These inquiries will be dealt with for each of the different possible characterizations of the Inside Passage — as internal waters, territorial waters, or as an international strait. Thus, for an internal waters regime, this Article will first examine whether the Inside Passage can be classified as internal waters, and then it will examine the right of innocent passage within internal waters. If there is such a right, then this Article will examine whether the fee is an acceptable infringement of that innocent passage right and whether the U.S. fishing boat transit would constitute innocent passage.

b. The Inside Passage as Internal Waters

Traditionally, the regime for internal waters allows the coastal state almost the same sovereignty as it would exercise over its land. Therefore, the practice was that in internal waters, there was no right of innocent passage. That rule relied on the traditional definition of internal waters: that they are generally considered to be waters to the landward side of the low water mark along the coast. Internal waters have included inland seas, lakes, rivers, closed bays, and some inlets. For other coastal features, the most important consideration for determining the internal waters relates to baselines drawn around the coast. The landward side of the baselines is the internal waters, and the seaward side is the territorial sea and the domain of the UNCLOS, where the right of innocent passage prevails. Traditionally, baselines were drawn to the contour of the coast along the low water line regardless of the nature of the coast.

The modern trend allows countries to employ straight baselines where their coast is “deeply indented.” UNCLOS allows states with archipelagic island systems and unusual coastlines to employ straight baselines and, hence, enclose small sections of water as internal waters. At least eighty

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134. MYRES S. MCDOUGAL & WILLIAM T. BURKE, THE PUBLIC ORDER OF THE OCEANS 64 (1962) (“That a state has all the competence over its internal waters that it has over land areas within its boundaries has long been accepted.”).

135. UNCLOS, supra note 4, art. 5; see also Fisheries (U.K. v. Nor.), 1951 I.C.J. 116. For the potential vagueness of this concept, see REISMAN & WESTERMAN, supra note 131, at 5-10. The authors describe the many different versions of “low water mark” employed by different states, e.g., one state uses the “Indian springs low water mark.” On the U.S. west coast the “lower low-water” is used while on the east coast the “mean low-water” is used in Navy hydrographic charts. Id.

136. UNCLOS, supra note 4, art. 5, para. 1 (“[W]aters on the landward side of the baseline of the territorial sea form part of the internal waters of the State.”); see also id. art 4, para. 2 (“The drawing of straight baselines must not depart to any appreciable extent from the general direction of the coast, and the sea areas lying within the lines must be sufficiently closely linked to the land domain to be subject to the regime of internal waters.”).

137. Id. art. 7, para. 1. The first major test of this practice was upheld in Fisheries (U.K. v. Nor.), 1951 I.C.J. 116. Interestingly, the baseline argument usually is raised in order to define the territorial sea, not to define the internal waters.

138. UNCLOS, supra note 4, art. 7, para. 1.

In localities where the coastline is deeply indented and cut into, or if there is a fringe of islands along the coast in its immediate vicinity, the method of straight baselines joining appropriate points may be employed in drawing the baselines from which the breadth of the territorial sea is measured.

Id.
countries have employed straight baselines. Canada passed baseline enabling legislation in 1965 and opted to employ straight baselines along sections of the British Columbia coast in 1969. Specifically, Canada used straight baselines along only the west coasts of Vancouver and the Queen Charlotte Islands. Absent explicit baseline legislation for the east coast of Vancouver Island and for the mainland coast, it would appear that the territorial sea starts at the low water mark along those coasts.

The transit fee applied to transit through the waterways “between Vancouver Island and the mainland, Fitzhugh Sound, Finlayson Channel, Princess Royal Channel, Principe Channel, Grenville Channel and Laredo Sound.” A quick glance at the map in Figure 1 will show that, apart from the waters between Vancouver Island and the mainland, these other channels are narrow enough that they could be considered inland waterways and, hence, internal waters. However, the passage between Vancouver Island and the mainland is sufficiently large, particularly at the Queen Charlotte Strait and the Strait of Georgia, that those waters should be considered territorial seas with the right of innocent passage for U.S. fishing boats. Canada could claim that those waterways are internal waters by arguing that the baselines along the Vancouver and Charlotte Islands have the effect of making everything to the east of those baselines internal waters. However, for baselines to lawfully internalize sea areas, the areas enclosed by the baselines have to be sufficiently connected to the land. In other words, the waters enclosed by the Canadian baselines must have the character of internal waters for the enclosure to be permissible. Two factors to be considered when deciding this point are whether international trade routes cut across these waters and whether foreign vessels enter these waters for purposes other than reaching the shore. These waterways are used for international trade, and

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139. REISMAN & WESTERMAN, supra note 131, at 105. According to the thesis of this book many, if not most, of those baselines are invalid under UNCLOS’s rules for application of straight baselines. Id.

140. Territorial Sea and Fishing Zones Act, R.S.C., ch. 22, § 5 (Can.). For straight baselines along the west coasts of Queen Charlotte Island and Vancouver Island, see Orders in Council, P.C. 1969, at 1109 (May 26, 1969); see also DONAT PHARAND, CANADA’S ARCTIC WATERS IN INTERNATIONAL LAW 155, 182 (1988).


142. Licence Fee, supra note 2, at 1; see also supra Figure 1 (points 13, 12, 6, 5, 10, and 7, respectively).

143. For the purpose of examining the transit fee, it is not necessary to explore the status of these narrow straits. The problems of the large body of water between Vancouver Island and the mainland will provide enough cause for criticism of the transit fee’s legality.

144. Laredo Sound could possibly be considered territorial sea as well. Contrary to some jurists’ arguments, Canadian fishery closing lines across the Queen Charlotte Sound do not have the effect of enclosing waters as internal waters. Nor does a transit regulation, exempting U.S. citizens from requirements to obtain permission to transit the Inside Passage (dated from 1978), have the consequence of creating internal waters where there were no internal waters before. But see McDorman, supra note 23, at 497-501 (arguing that closing lines, Canadian judicial decisions, and transit regulations lend considerable weight to Canada’s argument that Inside Passage is internal waters with no right of innocent passage).

145. “[T]he sea areas lying within the lines must be sufficiently closely linked to the land domain to be subject to the regime of internal waters.” UNCLOS, supra note 4, art. 7, para. 3; see also REISMAN & WESTERMAN, supra note 131, at 98-100.

146. REISMAN & WESTERMAN, supra note 131, at 100.
U.S. boats travelling to Alaska have historically entered these waters with no intention of landing anywhere in Canada. Undoubtedly, the U.S. commercial fishing boats involved in the salmon dispute only intended to traverse the Canadian Inside Passage and not to stop anywhere in Canada. Both of these factors argue against attributing internal waters status to these sections of the Canadian Inside Passage.

Similarly, where the use of straight baselines results in the creation of internal waters from waters which have historically been governed by a right of innocent passage, that same right of innocent passage would still exist in those waters after their enclosure by straight baselines. If the Inside Passage had previously been treated as territorial seas, or if U.S. fishing boats had always exercised the right of innocent passage, then U.S. fishing boats would still have a right of innocent passage to the same extent that the right was guaranteed under the prior regime. Before Canada’s application of straight baselines in 1969, these waters would have been territorial or high seas, depending on the distance from the low water mark. Canada’s failure to focus on its baselines before the 1960s lends support to the position that innocent passage was unhampered in large portions of the Inside Passage.

These waters probably would have been subject to the default regime, which would not have classified them as internal waters, but rather as territorial seas out to the then three mile limit, and then as high seas.

Even if U.S. vessels have a right of innocent passage through the Canadian Inside Passage, it is not clear in the UNCLOS whether that right is absolute. Even in the territorial sea, the right of innocent passage is not absolute. The UNCLOS says that when baselines create internal waters, innocent passage shall be as “provided in this Convention.” The question arises whether this means innocent passage is subject to the limits for territorial seas regulations as listed in articles 19 and 21. Logically, a coastal state should have more power to enforce its regulations in its internal waters than in its territorial sea. However, there is an argument for applying the laws of the territorial sea regarding innocent passage, as this was the regime in force before it became internal waters. It would then be consistent to continue to apply the same regime. Because the UNCLOS is not clear on this matter, Canada’s action falls into a grey area.


148. I have experienced this myself when returning to Seattle in a fishing boat by way of the Canadian Inside Passage. I had wanted to go ashore in Canada, but the skipper of the boat refused, saying that stopping in Canada would require him to complete reams of bureaucratic paperwork.

149. “Where the establishment of a straight baseline in accordance with the method set forth in article 7 has the effect of enclosing as internal water areas which had not previously been considered as such, a right of innocent passage as provided in this Convention shall exist in those waters.” UNCLOS, supra note 4, art. 8, para. 2.

150. Certain Congress thought that the U.S. boats had an innocent passage right. See Fisheries Act of 1995, § 401, 109 Stat. at 388; 141 CONG. REC. H10,676 (daily ed. Oct. 24, 1995) (“The Congress finds that . . . customary international law and the United Nations Convention on the Law of the Sea guarantee the right of passage, including innocent passage, to vessels through the waters commonly referred to as the 'Inside Passage' off the Pacific Coast of Canada.”). This language was also present in the version of this bill presented in July 1994. 140 CONG. REC. S8548 (daily ed. July 12, 1994).

152. UNCLOS, supra note 4, art. 8, para. 2.
Apart from the possible grey area in the UNCLOS in situations where territorial seas are changed by baselines into internal waters, it would appear as though there are major portions of the Inside Passage that cannot be classified as internal waters. Those areas should be subject to the territorial waters regime, and hence U.S. fishing boats must be allowed innocent passage to the extent that such passage in the territorial sea is guaranteed in the UNCLOS.

c. The Inside Passage as Territorial Seas

The territorial sea extends up to twelve nautical miles from a coastal state’s baselines. The rules that apply to a territorial sea do not allow Canada as much freedom as the rules governing internal waters. Canadian control over its territorial sea is governed entirely by the UNCLOS and other rules of international law. Thus, a unilateral Canadian action to change the character of that control would be in violation of international law, and the UNCLOS in particular. The UNCLOS devotes sixteen articles to innocent passage through the territorial sea (articles 17 through 33). Article 17 affirms that “ships of all states . . . enjoy the right of innocent passage through the territorial sea.”

The annual migration of U.S. fishing boats through the Inside Passage from the Northwest to the salmon rich waters of southeast Alaska falls within the meaning of innocent passage in the UNCLOS. Similarly, the argument that the U.S. fishing boats’ passage is not innocent as that term is defined in the UNCLOS is hard to sustain. For passage not to be innocent, a ship must engage in activity that is “prejudicial to the peace, good order or security of the coastal State.” Furthermore, such harmful activity must take place while the vessel is in the territorial sea. There is certainly an argument that these boats were travelling to Alaskan waters where they were going to engage in an activity prejudicial to Canada’s interests. However, the UNCLOS does not provide that future, uncertain, or speculative acts will result in a ship’s passage becoming noninnocent. Nor does it say that acts that will not occur within the coastal state’s jurisdiction can prejudice a vessel’s passage so as to make its passage noninnocent. The list in article 19 describing activities that would constitute non-innocent passage is probably not

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153. Id. art. 3. Every state has the right to establish the breadth of its territorial sea up to a limit not exceeding 12 nautical miles, measured from baselines determined in accordance with this convention.

154. Id. art. 2, para. 3. The sovereignty over the territorial sea is exercised subject to this Convention and to other rules of international law.

155. Id. art. 18, para. 1.

Passage means navigation through the territorial sea for the purpose of:
(a) traversing that sea without entering internal waters . . . ; or
(b) proceeding to or from internal waters . . .

Id.

156. Id. art. 19, para. 1.

157. Id. art. 19, para. 2 (“Passage of a foreign ship shall be construed to be prejudicial to the peace, good order or security of the coastal State if in the territorial sea it engages in any of the following activities . . .”) (emphasis added). The list includes such activities as threats against the coastal state, weapons discharges, spying, launching, or loading of other vessels or airplanes, willful pollution, fishing, and “any other activity not having a direct bearing on passage.” Id.
exhaustive. Nonetheless, the general intention surrounding the concept of non-innocent passage is that it involves activity within the jurisdiction of the coastal state whereas the U.S. fishing boats only engaged in transit.\[^{158}\] It does not seem possible to classify the U.S. fishing boats' transit as anything other than innocent passage as described in the UNCLOS.

The UNCLOS requires that a "coastal State shall not hamper the innocent passage of foreign ships through the territorial sea."\[^{159}\] Such hampering is defined to include regulations that have the effect of denying innocent passage or discriminating against particular foreign ships' right of innocent passage through the territorial sea. Certainly the Canadian fee could be construed as having denied such passage to boats that could not afford the fee or that did not want to spend the considerable time and effort required to obtain the fee sticker.\[^{160}\] Similarly, the Canadian act of forcing boats to halt their passage until they had sailed into the correct Canadian port and proffered the correct amount of Canadian currency, at the correct time and at the correct office, certainly "impaired" the fishing boats' innocent passage.

Congress and the State Department specifically pointed to the UNCLOS article 26 obligations when criticizing the Canadian fee.\[^{161}\] Article 26 of the UNCLOS explicitly forbids the imposition of a charge by a coastal state on ships engaged in innocent passage through a territorial sea.\[^{162}\] Charges can only be imposed for services rendered by the coastal state to the vessel. Nor can these charges be applied to some countries' vessels and not to other countries' vessels.\[^{163}\] As a charge aimed only at U.S. boats, the fee violated this provision.\[^{164}\]

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158. Id. (listing many activities that "would be considered prejudicial to the peace, good order or security of the coastal State" if ships were engaged in those activities while "in the territorial sea") (emphasis added).

159. Id. art. 24, para. 1.

The coastal State shall not hamper the innocent passage of foreign ships through the territorial sea except in accordance with this Convention. In particular, in the application of this Convention or of any laws or regulations adopted in conformity with this Convention, the coastal State shall not:

(a) impose requirements on foreign ships which have the practical effect of denying or impairing the right of innocent passage; or

(b) discriminate in form or in fact against the ships of any State or against ships carrying cargoes to, from or on behalf of any State.

Id.

160. Fishermen Fume, supra note 3, at A1 (showing that for small fishing vessels at beginning of fishing season additional $1100 can be significant burden).

161. See 141 CONG. REC. H10,676 (daily ed. Oct. 24, 1995); Vessels Paying the Fee, supra note 63.

162. UNCLOS, supra note 4, art. 26, para. 1 ("No charge may be levied upon foreign ships by reason of their passage through the territorial sea.").

163. Id. art. 26, para. 2 ("Charges may be levied upon a foreign ship passing through the territorial sea as payment only for specific services rendered to the ship. These charges shall be levied without discrimination.").

164. Interestingly, Raymond Chretien, the Canadian Ambassador during the fee dispute, alleged that the fee applied to all foreign vessels. See Pamela Brogan, Gore Meets With Canadian; No Cease-Fire In Fish War, June 23, 1994, available in WESTLAW, Allnewsplus Database. However, the official news release from Ottawa mentioned only that U.S. commercial fishing vessels would have to pay the fee. See Licence Fee, supra note 2, at 1. The discrimination contemplated in article 26 includes discrimination between Canadian vessels and foreign vessels, not just discrimination among foreign vessels. In comparison, article 25(3) is written to prohibit discrimination "among foreign ships" with regard to security interests requiring suspension of innocent passage. There is no doubt that Canadian commercial
However, article 21 allows restriction of innocent passage if the regulation or law is "in respect of . . . (d) the conservation of the living resources of the sea." Arguably, the fee was intended to further the negotiation of a treaty that deals with the conservation of salmon. As any vessel not complying with the permissible regulation was no longer engaged in innocent passage, the enforcement of the fee would be a valid exercise of the coastal state's sovereignty. Using this interpretation, the Canadian boarding and forcing of U.S. boats into Canadian ports to comply with the fee regulation would have been permissible under the UNCLOS. However, even if the fee were a permissible regulation, the UNCLOS still requires that the regulation apply to all foreign vessels proceeding through that section of the territorial sea governed by the regulation. The fee was not aimed at all boats traversing the Inside Passage. It was only aimed at U.S. commercial fishing boats, and as such it would not be valid under article 24.

Another regulation that is permissible relates to the maintenance of navigational aids. Canada could make an argument that the upkeep of the navigational aids and navigable character of the passage requires an assessment on vessels using the passage. The UNCLOS prohibits charges for passage unless they cover services actually provided to the vessel from the coastal state. Navigational aids and other costs associated with the upkeep of the Inside Passage could potentially be bona fide charges. A claim that the fee's purpose was the upkeep of navigational aids would, however, be a flagrant abuse of that provision given the history of the fee. In addition, as previously stated, the UNCLOS only permits charges that apply to all vessels using the waters. The fee was applied only to U.S. fishing boats and, therefore, failed to fall within any of the permissible charges that can be levied against vessels transiting the territorial sea.

In light of the above discussion, if sections of the Inside Passage are considered to be territorial seas, then the Canadian fee was most likely an illegal infringement of the right of innocent passage that should have been enjoyed by those U.S. fishing vessels that were forced to pay the fee.
d. The Inside Passage as an International Strait

International straits connect different parts of the high seas or exclusive economic zones and are generally available to the world's maritime vessels for unhampered transit.\textsuperscript{172} Because the Inside Passage consists of many separate straits and channels flowing between islands, it is possible to describe large sections of the Inside Passage collectively as an international strait. Those sections could be governed by the UNCLOS international straits regime.\textsuperscript{173} The Inside Passage connects one section of the territorial sea of the United States with a separate section of the territorial sea of the United States. It does not appear that the UNCLOS requires the two sections of exclusive economic zoning to be in different countries.\textsuperscript{174} Thus, it is possible to characterize the Inside Passage as an international strait and, hence, to apply the rules governing transit through international straits to the Canadian fee.

International straits impose even more restrictions on the sovereignty of the coastal state than do territorial seas. The UNCLOS provides that international straits, unlike territorial seas, are not only limited by an innocent passage right but also by a transit passage right.\textsuperscript{175} The coastal state, therefore, has diminished regulatory powers over vessels traversing the strait. Unlike innocent passage in territorial seas, the state along an international strait can not enforce marine conservation laws to the detriment of a transit right.\textsuperscript{176} Thus, if the Inside Passage is defined as an international strait, then the power of Canada to regulate its transit would be considerably diminished.

However, the UNCLOS section governing international straits does not apply to straits where there is an alternative sea route of "similar convenience."\textsuperscript{177} Similar convenience requires both "navigational" and "hydrographic" similarity.\textsuperscript{178} The Inside Passage is not the only marine route available for passage from the Northwest to Alaska. Between Alaska and the Northwest there is an alternative high seas route located to the north and west of Vancouver Island. Arguably, the open seas route is less hazardous and

\begin{footnotes}
\item[172] See id. art. 38; see also Corfu Channel (U.K. v. Alb.) 1949 I.C.J. 4 (holding that innocent passage of British vessels through Corfu Channel was right recognized by international law).
\item[173] The sections of the Inside Passage to which I am referring are the Strait of Georgia and Queen Charlotte Strait. The Canadians required U.S. commercial fishing boats to pay the transit fee to traverse these straits.
\item[174] This issue could be moot in that the Canadian Inside Passage connected the United States with Russian Alaska; in other words, it has historically been an international strait. Alternatively, the mere fact that more than one state relies on the passage makes it, by definition, an international strait as opposed to a domestic strait.
\item[175] UNCLOS, supra note 4, art. 42, para. 2 (“Such laws and regulations shall not . . . in their application have the practical effect of denying, hampering, or impairing the right of transit passage.”).
\item[176] Compare id. art. 42, para. 1 (listing types of regulations permitted for straits) \textit{with} id. art. 21, para. 1 (discussing territorial seas and innocent passage).
\item[177] Id. art. 38, para. 1. This section reads:
[I]f the strait is formed by an island of a State bordering the strait and its mainland, transit passage shall not apply if there exists seaward of the island a route through the high seas or through the exclusive economic zone of similar convenience with respect to navigational and hydrographic characteristics.
\item[178] Id.; see also id. art. 36; id. art. 45, para. 1 (regarding innocent passage).
\end{footnotes}
Countermeasures in the Salmon Dispute

complex than the Inside Passage route since it avoids many of the complex navigational hazards that ships encounter in the Inside Passage. If a vessel taking the open seas route to Alaska merely sets its autopilot, it will eventually arrive in Alaskan waters without ever entering Canadian territorial seas. However, despite such arguments, this route is more dangerous. The high seas route can cause delays due to weather and can expose a boat and its crew to severe and life threatening storms.\footnote{See Swardson, supra note 46, at A42 ("The State Department said that the fees could 'endanger the lives of U.S. fishermen by forcing them to traverse the more dangerous open seas.'")); see also Klass, supra note 56, at A1 (describing fisherman's decision not to risk open ocean passage because his children were on board).}

Under the convenience test, the high seas route would not relieve the Inside Passage from the restrictions applied to international straits.

This “similarity” test also requires that the hydrography of the alternate route be similarly convenient. Hydrography, by definition, includes tides, currents, and winds.\footnote{Id. art. 66, para. 4. In cases where anadromous stocks migrate into or through the waters landward of the outer limits of the exclusive economic zone of a State other than the State of origin, such State shall co-operate with the State of origin with regard to the conservation and management of such stocks. Id. Furthermore, article 66(1) provides that the state of origin of anadromous fish “shall have the primary interest in and responsibility for such stocks.” Id. art. 66, para. 1. Article 66(2) then goes on to say that the state of origin may “establish total allowable catches for stocks originating in its rivers.” Id. art. 66, para. 2. For more on how this provision relates to the dispute, see McDorman, supra note 23, at 480-87.} For vessels that are as small as the U.S. salmon fishing boats, the winds and corresponding swell encountered on the seaward side of the British Columbia islands would be considerably different than those encountered in the Inside Passage. Hence, the seaward route is probably not “similarly convenient” to the Inside Passage to Alaska.\footnote{183. UNCLOS, supra note 4, art. 300.} The Canadian fee would probably be invalid under the UNCLOS international straits regime.

e. Miscellaneous UNCLOS Obligations

The UNCLOS also calls on states to carry out the UNCLOS obligations “in good faith . . . and in a manner which would not constitute an abuse of right.”\footnote{182. UNCLOS, supra note 4, art. 300.} If Minister Tobin used the fee merely as a means of forcing the United States back to the bargaining table, even though he knew that the fee was in clear violation of the UNCLOS, then his action violated this provision.

Canada may attempt to invoke article 66, concerning anadromous fish, in order to support a claim that the fee is valid under the UNCLOS. Article 66 requires cooperation on conservation measures between all states through which anadromous species migrate.\footnote{Id. art. 66, para. 4.} The United States’ actions prior to the assessment of the fee could be characterized as noncooperation in violation of this article. However, article 66 is an affirmative obligation that does not
provide sanctions for its breach. States are meant to use the dispute resolution methods of the UNCLOS to deal with a state's breach of article 66. The UNCLOS provides for peaceful dispute resolution, not the unilateral use of a transit fee that itself violates many UNCLOS provisions. The unilateral imposition of a fee, enforced at gunpoint, would not be ordinarily considered a peaceful method of enforcing a provision of the convention.

Even though there are one or two provisions of the UNCLOS that might be construed to support the Canadian action, the fee as a whole appears to violate Canada's UNCLOS obligations and the United States' UNCLOS rights.

2. The Fee and Other Treaty Obligations

a. GATT and NAFTA

When criticizing the fee, the State Department also suggested that the fee violated Canada's transit and nondiscrimination obligations under the GATT and the North American Free Trade Agreement (NAFTA). Although the State Department and the Congress explicitly cited articles of the UNCLOS, they were more vague with regard to Canada's breach of these other treaty obligations. As will be shown below, this is no doubt because the GATT, and more particularly the NAFTA, are not really applicable to this dispute. However, since the United States accused Canada of breaching these important treaties, this Article will briefly examine the relevance of these treaties.

Both Canada and the United States are parties to the GATT and the NAFTA. Article V of the GATT places upon contracting parties the obligation to provide "freedom of transit" through their own respective territory for vessels going to or from the territory of another contracting party. Article V requires that the transit be the "most convenient for international transit." For the small U.S. fishing boats, the most convenient route for transit between Washington and southeast Alaska is through the Canadian Inside Passage. Furthermore, article V does not allow any transit charges except those related to the cost of the transit itself.

184. UNCLOS, supra note 4, art. 279 ("State parties to this convention shall settle any dispute between them . . . by peaceful means."). Furthermore, there are numerous articles detailing the various dispute mechanisms and procedures available to parties with disputes under the convention (articles 279 to 299). However, there is a possibility that the United States might not be bound by the UNCLOS dispute provisions. For a discussion of Canada's use of the United States' breach of article 66 as a material breach, allowing Canadian suspension of part of the UNCLOS under the Vienna Convention, see infra Part III.A.2.b (arguing that United States' breach would not relieve Canada of its GATT and UNCLOS obligations).


186. GATT, supra note 5, art. V, para. 2 ("There shall be freedom of transit through the territory of each contracting party, via the routes most convenient for international transit, for traffic in transit to or from the territory of other contracting parties.").

187. Id.

188. Id. art. V, para. 3 ("[S]uch traffic . . . shall not be subject to any unnecessary delays or restrictions and shall be exempt from . . . all transit duties or other charges imposed in respect of transit, except charges . . . commensurate with administrative expenses entailed by transit or with the cost of
Nor under the GATT can a contracting party discriminate with respect to this transit right. Hence, it appears that the Canadian fee was an impermissible obstruction of the U.S. fishing boats' GATT freedom of transit right.

This appearance of impermissible obstruction is strengthened by reference to the general commitment in the NAFTA to support GATT obligations.

b. The Vienna Convention on the Law of Treaties

The Vienna Convention on the Law of Treaties codified international customary law regarding interpretation and application of international treaties. The Vienna Convention provides that treaties be interpreted in good faith and according to their intended and ordinary meaning. Some of the more farfetched interpretations mentioned in the preceding pages, such as implying that the fee is a bona fide marine conservation regulation, would violate the Vienna Convention. Thus, Canada should be held to the plain meaning of the UNCLOS.

The Vienna Convention also deals with those occasions when states can suspend their treaty obligations. The convention allows a state to terminate or suspend a treaty when another party to that treaty materially breaches the treaty. The fee could be described as the suspension of Canada's UNCLOS and GATT obligations with respect to the United States. However, in order for the Canadian suspension to qualify under the Vienna Convention, the United States must have materially breached those treaties. The Vienna Convention states that, for the purpose of suspending a treaty, a material breach requires either repudiation of the treaty or violation of a provision essential to the treaty. Neither the United States' behavior

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189. Id. art. V, para. 2 ("No distinction shall be made which is based on the flag of vessels, the place of origin, departure, entry, exit or destination, or on any circumstances relating to the ownership of goods, of vessels or of other means of transport.").

190. Vienna Convention on the Law of Treaties, May 23, 1969, art. 31, para. 1, 1155 U.N.T.S. 331, 340 [hereinafter Vienna Convention] ("A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose."). The United States signed on April 24, 1970, but has yet to ratify the treaty. Canada signed on May 23, 1969 and ratified on October 14, 1970. However, the Vienna Convention is considered customary international law. See RESTATEMENT OF THE LAW (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES, International Agreements (Part III), introductory note at 145 (1986).

191. Vienna Convention, supra note 191, art. 60:
1. A material breach of a bilateral treaty by one of the parties entitles the other to invoke the breach as a ground for terminating the treaty or suspending its operation in whole or in part.
2. A material breach of a multilateral treaty by one of the parties entitles:

   (b) A party specially affected by the breach to invoke it as a ground for suspending the operation of the treaty in whole or in part in the relations between itself and the defaulting state.

192. The United States would conceivably have had to breach both treaties, or Canada would still be bound under the nonbreached treaty since both treaties guarantee transit rights through the Inside Passage. But see infra Part III.B.1 (discussing countermeasures and breach of treaties).

193. Vienna Convention, supra note 190, art. 60.

3. A material breach of a treaty, for the purposes of this article, consists in:
(a) A repudiation of the treaty not sanctioned by the present Convention; or
(b) The violation of a provision essential to the accomplishment of the object or
during the negotiations with Canada nor U.S. fishing for salmon would have constituted behavior in breach of the UNCLOS and the GATT that would prevent the accomplishment of the purposes or objectives of those treaties.

B. Countermeasures and the Transit Fee

Having determined that the fee was most likely a breach of Canada's UNCLOS and GATT obligations, we are left searching the corpus of international law for a doctrine that could justify Canada's behavior. The doctrine of countermeasures provides a tool that may legitimize Canada's apparently illegal behavior in this international dispute.

International disputes between states take place within a context very different from domestic disputes. Two parties to a domestic dispute can go to court and receive a binding and enforced judgment that will resolve the dispute. In the international arena, there is very little binding and compulsory jurisdiction. International law is largely built on reciprocity and consent. Historically, states could have resorted to gunboat diplomacy, that is, the use of force to intimidate a weaker state into making concessions to the stronger state. Today, gunboat diplomacy is looked on with great disfavor.

Occasionally, it is possible for a dispute to be resolved in one of the international dispute resolution bodies or in the domestic courts of one of the states. Failing these approaches, states are left to their own devices to resolve a dispute. At that point, states will frequently resort to justified self help in the form of nonforcible countermeasures. Over the past few decades, these countermeasures have come under close scrutiny within the international legal community. Norms have been generated governing the use of countermeasures during international disputes. Under some circumstances, otherwise prohibited state action is transformed into a legitimate countermeasure.

The International Law Commission's Draft Articles on State Responsibility attempts to define countermeasures:

The wrongfulness of an act of a State not in conformity with an obligation of that State towards another State is precluded if the act constitutes a measure legitimate under international law against that other State, in consequence of an internationally wrongful act of that other State.

In other words "[a]ny state injured by an internationally wrongful act is entitled in principle not to comply with its legal obligations toward the purpose of the treaty.

Id.

194. In fact it has been claimed that the largest amount of international law is enforced in domestic courts. However, rarely will this entail a domestic court enforcement of an international law obligation against a foreign state. See Mary Ellen O'Connell, Using Trade to Enforce International Environmental Law: Implications for United States Law, 1 IND. J. GLOBAL STUD. 273, 279 (1994). Interestingly, this dispute has had significant domestic court involvement, as described in the text.

Many international jurists have attempted to determine the necessary conditions for an otherwise illegal unilateral state action to be considered a legitimate countermeasure. However, the doctrine is still evolving. There is considerable uncertainty and disagreement within the international legal community despite the careful attention given to this field by the International Law Commission (ILC) in its studies of state responsibility. This body of international law experts has been unable to codify or even agree on the contours of countermeasure jurisprudence. However, the requirements that have been largely accepted are as follows:

a. There must be a violation of an international obligation causing injury to a state (or at least a good faith belief to that effect by the allegedly injured state).
b. A countermeasure cannot be taken until the injured state has demanded cessation of the wrong and redress for the injury.
c. The countermeasure must be directed to ending the violation and obtaining redress for the wrong and not to an outcome extraneous to the violation.
d. The countermeasure must not be disproportionate to the violation and the injury suffered.
e. The countermeasure must not involve the use or threat of force contrary to the UN Charter.
f. The countermeasure must not violate international law obligations for the protection of fundamental human rights or peremptory norms of international law.

This Article will examine the Canadian transit fee to determine whether it satisfies the above conditions and, hence, can be regarded as a legitimate countermeasure.

1. Prior Breach as a Necessary Condition

Some jurists believe that countermeasures are legitimate only where there has been a prior breach by one state of an obligation to another state. There are jurists who would even allow a countermeasure to be legitimate where the state only believed that the other state had breached its obligations, even if the other state had not in fact done so.
Canada could claim that the United States breached its obligations under the Pacific Salmon Treaty (primarily article III) and its UNCLOS article 66 obligations.\textsuperscript{202} The damage resulting from that breach was both economic and environmental. In addition, some jurists consider that a state can use countermeasures to enforce “customary environmental law.”\textsuperscript{203} The behavior of the United States regarding the Pacific salmon could be in breach of such laws. Canada could argue that the imminent demise of the Pacific salmon fisheries forced them to engage in a countermeasure pursuant to customary environmental law.

Canada could also claim that the United States’ negotiating stance constituted a breach for the purposes of countermeasures. The tribunal in the seminal Air Services Agreement Case asserted that “the Arbitral Tribunal does not believe that it is possible, in the present state of international relations, to lay down a rule prohibiting the use of countermeasures during negotiations.”\textsuperscript{204} This view of countermeasures also applies when one side fails to negotiate in good faith. The argument follows from the premise that countermeasures are only to be used by states upon necessity, which “is proven when good faith negotiation has proven fruitless. At that point countermeasures can no longer be ‘avoided.'”\textsuperscript{205} In this instance, the failure to negotiate in good faith is the breach or wrongful behavior allowing the victim state to engage in countermeasures.

Certainly, Canada can claim that when it imposed the fee, the United States had breached its duty to negotiate in good faith. In fact, the quid pro quo of the fee’s removal was that the United States promised to return to the negotiating table and negotiate in good faith.\textsuperscript{206} In short, the combination of the United States’ Pacific Salmon Treaty breach, possible UNCLOS article 66 breach, environmental customary law breach, and its failure to negotiate in good faith created the conditions allowing Canada legitimately to apply a countermeasure against the United States.

2. Prior Demand for Redress as a Necessary Condition

In general, the idea behind countermeasures is to force the parties to overcome an impasse between two parties. It therefore makes sense to require that there first be a demand that the impasse be resolved before one side can

\begin{itemize}
  \item \textsuperscript{202} Pacific Salmon Treaty, supra note 1, art. III.
  \item (1) With respect to stocks subject to this Treaty, each Party shall conduct its fisheries and its salmon enhancement programs so as to:
  \begin{itemize}
    \item (a) prevent overfishing and provide for optimum production; and
    \item (b) provide for each Party to receive benefits equivalent to the production of salmon originating in its waters.
  \end{itemize}

  \item Id.
  \item \textsuperscript{203} O’Connell, supra note 194, at 289.
  \item \textsuperscript{204} Air Services Agreement of March 27, 1946 (U.S. v. Fr.), 54 I.L.R. 304, para. 91 (1978) (Arb. Trib. established by Compromise of July 11, 1978).
  \item \textsuperscript{205} O’Connell, supra note 194, at 289. However, there is support for the view that countermeasures need no prior notification where there is no duty to negotiate or resort to dispute settlement. \textit{See}, e.g., ZOLLER, supra note 6, at 119-20.
  \item \textsuperscript{206} Truehart, supra note 9, at A29.
\end{itemize}
resort to the more extreme use of a countermeasure. Countermeasures must be preceded by a demand from the aggrieved state to the offending state to rectify its behavior. Reprisals are illegal unless preceded by a request for redress. Canada continually and consistently demanded that the United States resolve its own internal differences and negotiate in good faith to solve the Pacific salmon crisis before it became too late to save the salmon fishery from disaster, thereby satisfying the redress demand requirement.

3. "Narrow in Scope" as a Necessary Condition

Countermeasures must be directly aimed at resolving the wrongful state’s breach. In the Inside Passage dispute, the wrongful state’s breach was most proximately the United States’ failure to negotiate a new Pacific Salmon Treaty in good faith. The issue under a “narrow in scope” condition is whether the transit fee was narrowly directed to rectifying this breach. The fee was only aimed at commercial fishing boats and was otherwise minimally disruptive. Once the United States agreed to return to the negotiating table, the fee was removed. It is hard to imagine a less severe Canadian action that would have been more directly aimed at the U.S. negotiations. Thus, the transit fee satisfies this condition.

4. Proportionality as a Necessary Condition

Countermeasures must be proportionate to the violated international obligation. The problem with proportionality is that it can be hard to calculate, particularly where a countermeasure is not reciprocal. When assessing proportionality, jurists frequently refer to the purpose of the countermeasure. If the purpose is to achieve a speedy end to a dispute, a countermeasure can permissibly be more severe than if its purpose is to act as a reciprocal economic action. Additionally, in the Air Services Agreement Case, the effects of the breach and countermeasure were taken into account when measuring their proportionality.

The Canadian fee was intended to force the United States back to the negotiating table. The fee was narrowly tailored and affected those directly involved in the particular industry subject to the dispute. While the fee could possibly have led to a high seas tragedy for some of the smaller fishing boats that chose the riskier open seas route to Alaska, such a tragedy never happened. The fee merely resulted in the sacrifice of effort, time, and money

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207. For more on the details of demand, see ELAGAB, supra note 6, at 64-79.
208. See id. at 65; Schachter, supra note 196, at 472 n.8.
209. ELAGAB, supra note 6, at 67.
210. See ELAGAB, supra note 6, at 34, 83.
212. ELAGAB, supra note 6, at 86.
213. Id. at 94. Similarly, dependence and reliance between the two states have also been suggested as measuring devices when determining proportionality. For more on measuring proportionality, see id. at 86-93. Elagab cites Congress' passage of the Sugar Act of 1948 against Cuba as an example of reliance and dependence being used to measure proportionality. Id. at 92-93.
by the fishers and the U.S. government. The possible benefits to the economy and environment, if the fee saves the fisheries from further overfishing, would easily offset these temporary costs. In sum, the Canadian transit fee was a proportionate response to the United States’ negotiating posture and behavior.

5. Nonuse or Threat of Force as a Condition

Countermeasures must not resort to the threat or use of force in violation of the U.N. Charter. The transit fee was merely a pecuniary tool to force the United States back to the negotiating table. Certainly, the Canadians employed armed vessels and helicopters to enforce the fee. However, such enforcement, especially where controlled and subject to the rule of law, does not appear to rise to the level contemplated in this condition. Consequently, the transit fee was a peaceful, unilateral countermeasure.

6. Ius Cogens Limitation as a Condition

Countermeasures should not violate *ius cogens* or other fundamental international legal norms such as human rights. Impairing historically granted transit rights does not rise to the level that could be considered a violation of *ius cogens* or other fundamental rights.

7. Miscellaneous Legal Issues for Countermeasures

The *Tehran Hostages Case* held that, where the breach affects an existing self-enclosed legal regime with its own dispute resolution methods, resort to a countermeasure might not be justified. This is because the legal regime surrounding diplomatic immunity provides its own dispute resolution mechanism, its own “means to counter-balance a violation of those rules.” Thus, countermeasures are prohibited within that context. These regimes include diplomatic immunities and, with relevance to this Article, possibly the Law of the Sea.

Some jurists have explicitly stated that a countermeasure restricting the right of innocent passage through a territorial sea or international strait is illegitimate because the Law of the Sea is a closed system, with built-in dispute resolution mechanisms, in the same manner as diplomatic immunity. However, that view is premised on the argument that the UNCLOS includes its own method for resolution of such transgressions. At the time of the dispute, the UNCLOS was not formally in force, and thus its dispute resolution mechanisms were not operational. In addition, the United States has not formally ratified the UNCLOS, and Canada never signed onto

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215. United States Diplomatic and Consular Staff in Tehran (U.S. v. Iran), 1980 I.C.J. 3, 40 (May 24); see also *Zemanek, supra* note 211, at 371 (arguing that *Tehran* case should be read as only applying to diplomats).
216. *ELAGAB, supra* note 6, at 119.
217. *Id.* at 114.
218. *Id.* at 113-16.
the 1958 Geneva Convention on the Territorial Sea and Contiguous Zones. Thus, there was no common closed system to preclude the use of countermeasures. Hence, it is incorrect to characterize the Law of the Sea obligations between these two parties as part of a closed system that precluded resort to countermeasures.

It has been suggested that the GATT should be considered a closed system for the purposes of countermeasures because the GATT requires prior consent from all parties for one state to undertake a countermeasure.\textsuperscript{219} GATT article XXIII(2) (nullification and impairment clause) requires that retaliation be authorized by the contracting parties. However, the contracting parties have frequently resorted to other provisions of the GATT, which allow them to suspend obligations unilaterally without the approval of the other contracting parties.\textsuperscript{220} Furthermore, the United States itself has frequently resorted to trade sanctions as a countermeasure.\textsuperscript{221} It would thus be anomalous for the United States to claim that the GATT precludes countermeasures because it is a closed system. Thus, the Canadian fee survives as a legitimate countermeasure even under a possible closed system limitation.

Many jurists, including the ILC's most recent Special Rapporteur for State Responsibility, believe that offended states must make use of all available dispute procedures before countermeasures are allowed.\textsuperscript{222} However, this "exhaustion" requirement has been the subject of much debate within the international legal community, and arguably is not yet customary international law.\textsuperscript{223} Whether or not such a rule is part of the accepted requirements for a legitimate countermeasure, there is no doubt that the repeated attempts by Canada to negotiate a resolution to the impasse caused by the disunity within the U.S. camp satisfy such an exhaustion requirement.

Finally, the scope of a countermeasure must be limited to the wrongdoer state and must not affect third party states.\textsuperscript{224} This requirement turns the prohibited discriminatory application of the transit fee — that it only applied to U.S. fishing boats — into a positive attribute of the fee. Although both the UNCLOS and the GATT have a particularly harsh view of discriminatory rules, discrimination is a necessary requirement in a countermeasure.

The Canadians always assumed that the fee was a legitimate action. The U.S. fishermen claimed that the fee was illegal under international law. However, those claims focused on the fee's violations of Canada's treaty obligations. The United States did not focus on the fee as a countermeasure. Given that the doctrine of countermeasures is well known, the failure of the United States to raise any argument about the fee as an illegitimate countermeasure is significant. Aside from the fact that the United States has

\textsuperscript{219} ZOLLER, supra note 6, at 119. But see O'Connell, supra note 194, at 288 (stating that GATT should not be considered closed system).

\textsuperscript{220} ZOLLER, supra note 6, at 119; O'Connell, supra note 194, at 288.

\textsuperscript{221} O'Connell, supra note 194, at 281. The United States is the primary user of countermeasures.


\textsuperscript{223} See Schachter, supra note 196.

\textsuperscript{224} Zemanek, supra note 211, at 371.
been involved in almost all the significant countermeasure cases — the *Air Services* and the *Iran Hostages* cases, to name just two — countermeasures are explicitly discussed in detail in the American Law Institute’s *Restatement of Foreign Relations Law.*\(^\text{225}\) If the United States was going to claim that the fee was not a legitimate countermeasure, such an argument should and would have been made early in the dispute when the fee was still a contentious action.

Thus, under the emerging doctrine of legitimate countermeasures, the Canadian fee was a legal state act. Canada could properly suspend its UNCLOS and GATT obligations with respect to U.S. commercial fishing boats’ passage through the Canadian Inside Passage.

C. Unilateral State Actions and the Fee

Determining that the Canadian transit fee is a legitimate state action can provide other similarly situated states with an example to follow in their disputes. However, those states must first determine whether their dispute and chosen unilateral action are in fact similar to the Canadian transit fee. Thus, the Canadian transit fee must be further characterized and placed within the familiar context of common unilateral state actions and remedies in international relations.

Unilateral state actions can assume different forms and attempt to achieve different goals. They can take the form of retorsion, suspension or termination of treaties, and reprisals. The purpose of these unilateral actions is to receive reparation or reciprocity. These actions are sometimes undertaken before another state has acted in order to coerce the other state into either not acting or acting differently. At the extreme, a state undertakes these actions to punish the other state for its actions. Below, I will provide a brief description of the common unilateral state actions and their intended effects.

Retorsion is “an unfriendly but nevertheless lawful act by the aggrieved party against the wrongdoer.”\(^\text{226}\) However, some retortive acts that would otherwise be legal could be precluded by treaty obligations.\(^\text{227}\) Unless a treaty requires “friendly” behavior, unfriendly behavior such as severance of diplomatic relations is not illegal.\(^\text{228}\) “[I]n a treaty relationship between parties, suspension and termination involve, respectively, temporary or final withdrawal, either of the violated norm as such, or of the legal instrument embodying the norm in whole or in part.”\(^\text{229}\) Article 60 of the Vienna Convention on the Law of Treaties allows suspension or termination of a treaty for a material breach.\(^\text{230}\)

Finally, reprisals are a “right for the wronged state not to perform a rule

\(^\text{225}\) *RESTATEMENT OF THE LAW (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES* § 905 (1986). This section provides a great deal of detail both in the Comment and in the Reporters’ Notes.

\(^\text{226}\) *ZOLLER, supra* note 6, at 5.

\(^\text{227}\) *ELAGAB, supra* note 6, at 4.

\(^\text{228}\) *Zemanek, supra* note 211, at 370-71.

\(^\text{229}\) *ELAGAB, supra* note 6, at 27.

\(^\text{230}\) However, the Vienna Convention does not rule out a suspension or termination pursuant to a legitimate countermeasure. *See Mazzeschi, supra* note 200, at 59-60.
of international law in dealings between itself and the wrongdoer." Historically, reprisals have meant armed reprisals. Today, the international community frowns on armed reprisals, which are illegal under article 2(4) of the U.N. Charter. Aside from armed reprisals, in the typical modern reprisal, one state does not perform an international obligation, though does not mean that the state contests the legal nature of the underlying obligation. In this way, it is different from suspension or termination of a treaty, which can be legally authorized under international law. Unlike reciprocity, which also does not bear on the underlying legal obligations, there is no requirement of equivalence of action. Thus, a state that engages in a reprisal will suspend a different rule than that which is the subject of the initial wrongdoing of the other party.

The goal of these unilateral actions is reciprocity and reparation. Reciprocity “may be defined as acting the same way or doing the same thing as another party. . . . [R]eciprocity involves an act of the same nature as and similar to the original act.” “Reparation must, as far as possible, wipe out all the consequences of the illegal act and reestablish the situation which would in all probability, have existed if that act had not been committed.” Reparation is often the intended consequence of many of the unilateral actions described above. Coercion exists where one party attempts to bring pressure, often through one of the actions described above, to make the other party change its behavior. Coercive actions are temporary in that they will be terminated if the other party changes its behavior. Punishment, as a purpose of unilateral action, is “the infliction of harm upon the wrongdoer. . . . Punishment is a chastisement. . . . [or] a satisfaction, a revenge.”

Because the fee was legal, it can then be classified as an example of retorsion — “an unfriendly but . . . legal act.” In addition, the fee could be described as a legal reprisal — the suspension of an otherwise legal obligation, in this case the obligation to afford unobstructed innocent passage to U.S. commercial fishing boats. The purpose of the fee, whether legal or not, was clearly coercion: an attempt to persuade another party to change its behavior. In this case, the Canadians attempted to persuade the United States to return to serious negotiations to resolve the problems with the Pacific Salmon Treaty. The fee also contained an element of punishment, since it resulted in a kind of penalty for northwest fishers. Furthermore, it must have

231. ZOLLER, supra note 6, at 35-36. This definition can be traced to the Nauilaoa case. See id. at 41.
232. For a history of the doctrine of reprisals, see ELAGAB, supra note 6, at 6-36.
233. U.N. CHARTER art. 2, ¶ 4 (“All Members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the Purposes of the United Nations.”).
234. ZOLLER, supra note 6, at 14-15. For example, Israeli army shelling of enemy positions in retaliation for missile attacks on Israeli settlements is an act of reciprocity.
236. ZOLLER, supra note 6, at 51-54.
237. Id. at 55. However, regarding punishment, there are some who feel that punishment does not properly belong to the world of international countermeasures because it conflicts with the concept of state sovereignty. See Zemanek, supra note 211, at 370.
238. ZOLLER, supra note 6, at 5.
provided a sense of revenge and satisfaction for those Canadians harmed by U.S. overfishing.\textsuperscript{39} 

In comparison, when we characterize the United State’s responses to the fee, we see that its responses can be characterized as the traditional unilateral state actions. The congressional response, the amendment to the FPA, was intended by Congress to coerce Canada into not reinstating the fee. The legislative history concerning the proposed amendment explicitly asserts that the amendment to the FPA should be seen by Canada as a signal not to engage in such action again. Congressman Dicks said that even though the “Canadians recently agreed to drop the transit fee . . . the language of this legislation must remain in order to ensure that our fishermen are never again held hostage in this kind of fashion.”\textsuperscript{20} While parts of the congressional amendment are coercive, other parts generate reciprocal actions against an offending state. Where U.S. fishing vessels are subject to an illegal fee, the amendment calls on the President to “impose similar conditions on the operation or transit” of the offending state’s fishing vessels.\textsuperscript{241} Such a restriction of transit in U.S. waters would be a suspension of U.S. UNCLOS and GATT treaty obligations (most likely a temporary suspension while the wrongful fee is in force). Thus, the amendment to the FPA would result in a suspension of treaty obligations so as to act in a reciprocal manner to an offending state. However, the amendment itself, even though never used, was coercive in that it intended to stop Canada’s and other states’ actions merely by threatening a response to an offending state if that state’s conduct fell within the amendment’s domain.

Thus, we can characterize the fee as a reprisal (the suspension of Canada’s UNCLOS and GATT obligations in the Canadian Inside Passage) or as a legitimate suspension of a Canadian obligation (to allow innocent passage to U.S. fishing boats), while the aggressive fishing discussed earlier in this Article ends up looking like a “tit for tat” punishment of the United States that was intended to be reparation for previous years’ inequities.

\section*{IV. Conclusion}

Because the fee satisfies the generally accepted conditions for countermeasures, including breach of duty by an offending state, prior request for resolution, proportionality of response, and \textit{ius cogens} conformity, the fee

\textsuperscript{239} Following the breakdown of the July 1994 negotiations, the Canadians engaged in an aggressive fishing policy. That policy, given the Canadian perception of U.S. behavior, could be classified as a classic example of reciprocity — “an act of the same nature as and similar to the original act.” \textit{Id.} If U.S. fishermen were going to catch Canadian fish without regard to Canada’s concerns, the Canadians would engage in equivalent behavior and catch U.S. fish without regard to the United States’ concerns. In some measure, this overfishing was also an example of reparation. If U.S. overfishing was a violation of the Pacific Salmon Treaty, then Canada’s aggressive fishing policy would “as far as possible, wipe out all the consequences of the illegal act and reestablish the situation which would, in all probability, have existed if that act had not been committed.” \textit{Factory at Chorzów (G.D.R. v. Pol.), 1928 P.C.I.J. (ser. A) No. 17, at 47 (Sept. 13).} At least as far as equity was concerned, the Canadians thought that this aggressive fishing would wipe out the effect of the U.S. catch of Canadian origin salmon. Unfortunately, the long term consequences could quite possibly be disastrous for both countries.

\textsuperscript{240} 140 CONG. REC. H5476-77 (daily ed. July 12, 1994).

\textsuperscript{241} Fisheries Act of 1995, § 402(b).
can join the ranks of legitimate countermeasures. Having survived at least this examination of its legality, the fee will provide a precedent for other states wishing to use transit fees as countermeasures. Countermeasures are a product of customary international law. Because the contours of the law are determined by a slow accretion of accepted state behavior, it is especially important to determine the Canadian fee's contribution to an understanding of what these uncertain and contested conditions are.

The first issue that the fee as a countermeasure can help to resolve is the requisite characterization of a state's action as punitive or retortive. The Canadian fee was coercive, punitive, and revengeful, but it still qualifies as a legitimate state action because it conforms to established principles of legitimacy. The characterization of the fee should not affect the action's legitimacy under a countermeasure doctrine.

Another recent area of heated debate concerns whether a state needs to exhaust all legal remedies before it can resort to a countermeasure or first merely needs to request a resolution. The fact that neither the United States nor Canada has required such exhaustion demonstrates these countries' attitudes to an exhaustion requirement. This lends validity to the argument that the exhaustion of all remedies need not precede legitimate countermeasures.

This dispute also provides precedent in the debate concerning what sort of breach of obligations is required before an injured state can resort to a countermeasure. It is arguable that the breach in this dispute was the United States' breach of its good faith duty to negotiate. More radically, it could be argued that the breach by the United States was a breach of emerging international environmental law. Thus, these nontraditional breaches can also result in a legitimate countermeasure.

Besides fleshing out the contours of the law of countermeasures, the Inside Passage fee illustrates that the use of countermeasures as a tool in resolving a dispute has several advantages. Disputes between states can be resolved through international mediation, but such mediation can be time consuming. Where environmental issues are involved, every delay makes the underlying issue harder to resolve successfully. In this case, by 1994, it was evident that prompt action by the states involved in Pacific salmon fishing was necessary to avoid an ecological disaster. The Canadian fee was absolutely necessary to convince the United States that the dispute needed to be resolved before it was too late. The international legal system, through the doctrine of countermeasures, legitimates necessary and immediate state actions that, but for this urgency, could have been resolved in an international tribunal.

Another advantage gleaned from the example of Canada's countermeasure against the United States is that countermeasures may provide an important tool for weaker states engaged in bilateral disputes. In this dispute, the United States had vastly more leverage and power than Canada as a result of the particular migratory habits of the Pacific salmon. The United States, as represented by Alaska, could comfortably maintain the status quo, but Canada's fisheries would slowly become nonviable. Thus, concerning the substance and timetable for the negotiations, the United States had the upper

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242. See Schachter, supra note 196, at 475.
hand. Canada's resort to a countermeasure, the transit fee, was instrumental in breaking the deadlock in negotiations for a new Pacific Salmon Treaty, even though it did not resolve the underlying dispute.

Independently, countermeasures rarely resolve disputes, but they are not without effect. The effect of the countermeasure was to force the United States back to the negotiating table and to generate public pressure within the United States to force the United States to negotiate a resolution. The fee served to inform the United States that Canada was prepared to take tough actions, so called "un-Canadian" actions, in order to achieve a solution to the salmon crisis. Canada's resort to a peaceful countermeasure, as opposed to more aggressive and destructive methods of evening the playing field, provides a useful and peaceful example to other weaker states in similar negotiations.

The successful use of a countermeasure in this dispute raises the issue of whether such countermeasures are deleterious to the international legal order. Through the use of this countermeasure, parts of Canada's UNCLOS, GATT, and other treaty obligations were suspended through the use of this countermeasure. One may argue that resorting to countermeasures to legitimate otherwise illegal state action can effectively undermine state respect for international law. However, in this case, Canada's transit fee will not only prove to be beneficial for the United States, Canada, and the Pacific salmon, it also creates a minimal dislocation of international law — the temporary suspension of innocent passage. If, as here, countermeasures are treated as an international form of "justification," subject to good faith and proportionate application, then we should not fear that the use of countermeasures will lead to an erosion of the international legal order. For one thing, the benefits to the countries outweigh the harm to the international rule of law. Second, weaker states will be able to negotiate fairly with stronger states through the use of countermeasures. By providing a safety valve equivalent to the justification and necessity doctrine in domestic law, states will explore peaceful unilateral remedies in disputes with other states before resorting to forceful measures. All this serves not to erode international law but to strengthen it.

In conclusion, the 1994 Canadian Inside Passage transit fee violated Canada's UNCLOS and GATT obligations. The fact that Canada "got away" with the fee illustrates the acceptability of such countermeasures in circumstances where a bilateral environmental treaty negotiation has reached an impasse. The otherwise illegal fee was a justified departure from the confines of Canada's international treaty obligations. This Article has dealt with the particular circumstances surrounding the 1994 fee. The recent call in Canada to reintroduce the fee for the 1996 salmon season could present completely different problems to legitimacy under countermeasure jurisprudence. Consequently, this Article's conclusion that the 1994 fee was a legitimate countermeasure is not a blanket validation of future Canadian Inside Passage transit fees. The 1994 fee will help the analysis of the threatened 1996 fee, if it joins the examples of countermeasures available for guidance and precedent. However, the Canadian Inside Passage fee has not yet received the attention that will allow it to contribute to the accretion of customary international law. Hopefully, this Article will stimulate that
attention, and by providing the international legal community with one more example of an acceptable countermeasure, it will enrich the discussion of this emerging international law doctrine.